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No. **76-332**

**MICHAEL BOUDIN, JR., CLERK**

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, CON-  
TINENTAL TELEPHONE CORPORATION, UNITED TELEPHONE  
COMPANY OF THE CAROLINAS and the UNITED STATES  
INDEPENDENT TELEPHONE ASSOCIATION, ET AL.,  
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED  
STATES OF AMERICA, ET AL.,  
*Respondents.*

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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Petitioners, representing three major telephone systems in the United States,<sup>1</sup> and the national trade association representing the approximately 1,600 independent telephone companies request that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit in this case.

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<sup>1</sup> These petitioners are American Telephone and Telegraph Co. ("AT&T") and its 23 associated Bell System operating companies, Continental Telephone Corporation, and two companies (United Telephone Company of the Carolinas and Carolina Telephone and Telegraph Company) which are part of the United System.

### OPINIONS BELOW

The decision of the Court of Appeals, which is not yet officially reported, appears at Appendix A to this petition.<sup>2</sup> It affirmed, by a 2-to-1 vote, the decision of the Federal Communications Commission, which is reported at 45 F.C.C.2d 204, and appears at Appendix B.

### JURISDICTION

The judgment of the Court of Appeals, which was filed on April 14, 1976, appears at Appendix C. Timely filed petitions for rehearing and rehearing *en banc* were denied on June 8, 1976, by orders which appear at Appendix D.<sup>3</sup> The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### QUESTION PRESENTED

In a radical departure from the pattern of regulation which has existed for over 50 years, the Federal Communications Commission in this case has asserted plenary power to regulate the terms and conditions of the connection of over 100 million pieces of telephone terminal equipment to local telephone exchanges; and it has purported to deprive the states of power to follow their independent policies, despite the uncontroverted facts that the states have pervasively regulated this field for over 50 years and that such equipment is and has been used over 95 percent of the time for intrastate and exchange communications. The

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<sup>2</sup> The appendices are separately bound in a companion volume which is cited as "Pet. App."

<sup>3</sup> The Court of Appeals denied rehearing by a 1-to-1 vote and rehearing *en banc* because all other active-service judges were disqualified.

question presented by the FCC's purported action is one of Congressional intent and not of constitutional power, that is, the issue is *not* whether Congress could constitutionally have granted the FCC the power it purports to exercise but whether it *did* grant that power. The question is:

Does the FCC's assertion of jurisdiction over such equipment and its preemption of the authority of state agencies violate Congress' express intent to preserve state jurisdiction and the explicit mandate of the Communications Act that (apart from radio licensing), "nothing in this Act" shall "apply or give the Commission jurisdiction with respect to facilities . . . for or in connection with intrastate communications service" (Section 2(b)(1)) or "with respect to facilities . . . for or in connection with . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communications" (Section 221(b)).

#### STATUTES INVOLVED

Pertinent provisions of the Communications Act and representative state regulatory provisions appear at Appendix E.

#### STATEMENT OF THE CASE

This case presents a basic issue of federal statutory construction involving the relationship between federal and state regulation. It will also determine whether regulatory jurisdiction over more than 100 million telephones and other pieces of terminal equipment is shifted from the states, which have regulated the field pervasively for over 50 years, to the FCC, which has now sought to preempt state authority.

Although state regulatory commissions are most directly affected by this federal assertion of jurisdiction drastically curtailing their authority, the decision below leaves the telephone companies who are responsible for service to the public in an untenable position: On the one hand the FCC has preempted jurisdiction over the connection of telephone terminal equipment while on the other the states continue to regulate the rates and services with respect to the very same local exchange facilities. The regulation of rates, services and facilities is inextricably intertwined and Congress recognized this fact when it deliberately assigned to the states and not to the FCC jurisdiction over "charges . . . services, facilities or regulations" for or in connection with intrastate and exchange communication service.

The FCC's decision, if permitted to stand, would drastically alter the Congressional distribution of power between state and federal agencies over communications common carriers and cause equally extreme changes in the manner in which the carriers provide the communications essential to the economic vitality of this country. The majority opinion below in affirming the FCC's action, has manifestly misconstrued the plain language of Sections 2(b)(1) and 221(b); and the opinion is inconsistent with this Court's basic approach to statutory construction. It would divest the states of their longstanding and pervasive authority over terminal equipment directly contrary to Congress' repeatedly expressed purpose to preserve existing state jurisdiction.

### **A. The Nature and Regulation of Telephone Service in the United States**

The local telephone exchange is the basic unit through which telephone service has been provided in the United States. Within the local exchange area, service is provided by using local lines ("loops") to link "terminal" equipment—telephones, switchboards, answering devices, etc.—ordinarily located in a home or business to central office switching facilities located at the telephone company's central office in the local exchange area.<sup>4</sup> Telephones and other terminal equipment in the exchange area are connected with one another through the switching equipment at the central office.<sup>5</sup> A local exchange with a single central office can readily be visualized as a rimless wheel with a telephone at the end of each spoke and with all communications passing through the hub which interconnects the spokes.

For long distance calls, local exchanges in different cities are themselves connected through a complex network of intercity lines, which may be cables, microwave channels or other types of long distance transmission facilities. Ordinarily, long distance calls are routed between local exchanges along these intercity lines by toll switching equipment designed to handle

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<sup>4</sup> A small local exchange may be served by a single central office while a larger local exchange may use a number of interconnected central offices within the local exchange area. There are thousands of exchange areas in the fifty states.

<sup>5</sup> The principal local exchange facilities—the central office switching equipment, local loops, and terminal equipment—function as an integrated unit. The telephone generates signals (e.g., through dialing) which travel along the same loops that carry the conversations and which operate the switching equipment at the central office.

inter-exchange traffic. These intercity lines comprise over 250 million circuit miles, and they provide routes and alternative routes between the thousands of individual exchanges.

For many years prior to the Communications Act of 1934 and continuing to the present, the individual states pervasively regulated intrastate and local exchange telephone service. This jurisdiction has extended to the rates, regulations, and conditions on which such service is offered and to the facilities predominantly used in providing the service such as the ordinary telephone itself. Under state law, telephone company ("carrier") service offerings are made through tariffs filed with the state regulatory agency and such agencies have power to review tariffs and to require the modification of rates, regulations, conditions and the provision of facilities under familiar statutory standards.<sup>6</sup>

This state regulatory jurisdiction has embraced the provision of telephones and other terminal equipment virtually from the outset of regulated service in this country. *E.g.*, *Gardner v. Providence Bell Co.*, 49 A. 1004 (R.I. 1901). The terminal equipment is connected directly into the local exchange switching equipment through local lines, and terminal equipment is part of the local exchange plant; in fact, well over 95 percent of the calls for which the telephone is used are intrastate or local exchange calls.<sup>7</sup> Consequently, telephones

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<sup>6</sup> The Virginia statute is illustrative and pertinent provisions appear at Pet. App. 1e. Other illustrative statutes are Maryland Code Ann., Art. 78; N.Y. Pub. Serv. Law; Minn. Stat. Ann. § 237.01, *et seq.*; Iowa Code Ann. § 490A.1, *et seq.*; N.C. Gen. Stat. § 62-1, *et seq.*

<sup>7</sup> At the time the Communications Act was passed the figure was

and other terminal equipment are ordinarily provided pursuant to the tariffs filed with the *state* regulatory agencies. See p. 21, below.

Accordingly, when the Communications Act was passed in 1934, there existed comprehensive state regulation of telephone companies, but there remained certain aspects of telecommunications—*e.g.*, rates for interstate calls—that the states did not or could not effectively control. In the Act, Congress sought to assure adequate federal regulation over these specified interstate matters, but also to preserve existing state jurisdiction against federal invasion. Thus, Sections 2(b)(1) and 221(b) provide that, apart from radio licensing, “nothing in this Act” shall “apply or give the Commission jurisdiction with respect to facilities . . . for or in connection with intrastate communications service” (Section 2(b)(1)) or “with respect to facilities . . . for or in connection with . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communications” (Section 221(b)).\*

The FCC’s specific statutory powers complement, rather than supersede, existing state regulatory au-

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estimated at “97½ or 98 percent” of all telephone calls (78 Cong. Rec. 10316 (1934)). Most recently the figure has been estimated at approximately 97 percent. Pet. App. 14b.

\* 47 U.S.C. §§ 152(b)(1), 221(b). Both Sections 2(b) and 221(b) preserve the FCC’s power to license radio frequencies under Section 301, 47 U.S.C. § 301. This qualification is merely to assure that carriers, like any other users of the limited number of radio frequencies available, do not use frequencies allocated to others. See, *e.g.*, H.R. Rep. No. 910, 83d Cong., 1st Sess. 1 (1953). Section 221(b) also requires, as a condition of the exemption, that state regulation exist; and such regulation does exist in every state.

thority. For example, the FCC is granted express authority over the rates for "interstate" calls which must be set forth in tariffs filed with the FCC (Sections 201-05, 47 U.S.C. §§ 201-05); and carriers proposing to construct or operate new "interstate" lines must obtain prior approval from the FCC. Section 214, 47 U.S.C. § 214. However, the statute does not purport to grant the FCC power over terminal equipment connected with local telephone exchanges and predominantly used for intrastate and exchange calls. Nor is the FCC's permission required for construction of intrastate or local exchange facilities.

The legislative history of the Act confirms that Sections 2(b)(1) and 221(b) represented a deliberate Congressional intent to preserve existing state regulation. As the Senate Manager of the statute explained:

"[A]t the request of the State commission representatives, we wrote in certain provisions that are not in the Interstate Commerce Act, to protect the State commissions against being overridden by this Commission [the FCC], as the Interstate Commerce Commission has overridden some of the State railroad Commissions."<sup>9</sup>

Congress therefore reserved to the States "exclusive" jurisdiction over intrastate service (S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934)) to assure that the legislation "does not affect" the 97½ or 98 percent of telephone communications that were and are intrastate. 78 Cong. Rec. 10316 (1934).

For over 40 years and until the present case, the FCC respected the jurisdictional limitations imposed by

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<sup>9</sup> *Hearings on S. 2910 Before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. 179 (1934) (Senator Dill). The legislative history is discussed at greater length at pp. 28-30, below.

Congress. Ordinary terminal equipment has been provided under state tariffs and the FCC has never claimed general authority over such equipment even though a very small fraction of the time it may be for interstate calls.<sup>10</sup> AT&T's FCC Tariff No. 263, which offers ordinary long-distance interstate telephone service and is concurred in by many other carriers, does not even purport to offer telephones or other terminal equipment, but provides (para. 1.1) that the station equipment is "furnished in accordance with the Telephone Exchange Service Tariffs," i.e., the tariffs filed with the state regulatory agencies by the local telephone companies.

#### **B. The FCC's New Regulatory Policies and the Proceedings Below**

In establishing FCC regulation, Congress not only restricted the FCC's jurisdiction to prevent federal interference with state regulation but also enacted public interest standards to be applied by the FCC within its area of competence. Under the Congressional plan the FCC in regulating interstate service may not "[m]erely . . . assume that competition is bound to be of advantage, in an industry so regulated and so largely

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<sup>10</sup> Only in comparatively rare situations, involving a tiny percentage of terminal equipment, is terminal equipment tariffed with the FCC under Sections 201-05 rather than with the state agencies. An example is certain military facilities which are used in conjunction with the interstate defense network and certain teletype-writer equipment that is not part of telephone exchange service and is predominantly interstate in usage. *E.g.*, *United States Department of Defense v. General Telephone Co.*, 38 F.C.C.2d 803 (1973), review denied, FCC 73-854 (1973), *aff'd per curiam sub nom. St. Joseph Tel. & Tel. Co. v. FCC*, 505 F.2d 476 (D.C. Cir. 1974); *AT&T-TWX*, 38 F.C.C. 1127 (1965).

closed as is this one . . . .”<sup>11</sup> This present case involves only delineation of the FCC’s jurisdiction—not the validity of the policies it seeks to implement. Nevertheless, the present controversy finds its roots in new FCC regulatory policies which require brief description.

In the 1960s, the FCC began to substitute for the “regulated monopoly” concept of telephone service long followed by it and by the state agencies a new approach of “restricted competition.” It first permitted certain businesses to construct their own interstate “private line” telephone facilities and later authorized the entry of numerous new common carriers (called specialized carriers) to provide interstate “private line” service in competition with the telephone companies. Similarly, in the so-called *Carterfone* case, the FCC held invalid interstate tariff provisions as applied to prohibit customer use of a device interconnecting two communications systems for “interstate or foreign telephone service.”<sup>12</sup>

However, in *Carterfone*, the FCC made clear that it was not requiring substitution of customer-provided telephones or other such terminal equipment to replace telephone company facilities; and it did not purport to interfere with the state tariffs or state regulatory authority.<sup>13</sup> Various telephone companies themselves

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<sup>11</sup> *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94-97 (1953). *Accord*, *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974).

<sup>12</sup> *Carterfone*, 13 F.C.C.2d 420, 441, *reconsideration denied*, 14 F.C.C.2d 71 (1968). The device in question was not a telephone or similar piece of terminal equipment; it was a means of connecting a private radio communications system to the telephone system. *Id.*

<sup>13</sup> See *AT&T “Foreign Attachments” Tariff Revisions*, 15 F.C.C.2d 605, 609-10 (1968), *reconsideration denied*, 18 F.C.C.2d 871

chose to provide substantially greater opportunity for the use of customer-supplied terminal equipment under intrastate and exchange tariffs. For example, new tariffs filed by the Bell System with the states generally permitted customers to connect electrically their own terminal equipment to local telephone exchanges through "protective connecting arrangements" safeguarding telephone company facilities and employees against improper transmissions of signals or excessive voltages.<sup>14</sup>

Although the state agencies permitted the new tariffs to become effective, many states became increasingly concerned about the adverse economic impact of expanded customer substitution of terminal equipment. For example, the National Association of Regulatory Utility Commissioners ("NARUC") recently concluded that widespread substitution of customer-provided equipment would increase telephone rates for ordinary local residential and business telephone users by \$360-740 million annually by 1980 and almost \$1 billion annually by 1984.<sup>15</sup> The North Carolina Utilities

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(1969): "Our decision in *Carterfone* does not hold that a customer may substitute his own equipment or facilities . . . for that furnished by the telephone company . . . ." *Id.*

<sup>14</sup> In general, the state tariffs prohibit the use of customer-supplied telephones and other terminal equipment except where specified conditions are met such as the use of protective connecting arrangements; they describe the conditions under which customer-supplied equipment can be utilized; and they offer the protective connecting arrangements at rates and under regulations described in the state tariffs. As noted, terminal equipment is offered pursuant to FCC tariffs in a very limited number of instances (see p. 9, above) and corresponding provisions are included in the federal tariffs.

<sup>15</sup> NARUC is the national organization of state commissioners responsible for utility regulation in the states. The state agencies'

Commission instituted an investigation to consider limiting connection of customer-provided terminal equipment for use in intrastate communication. Pet. App. 2b. Other states have made clear their desire to enforce existing state regulations requiring approval of or involving limitations on customer substitution of terminal equipment.

In September 1973, the FCC instituted the present proceeding to decide whether its actions "preempted" state regulation of terminal equipment connection. *Telerent Leasing Corp.*, FCC 73-901, Sept. 7, 1973, para. 1. The proceeding was prompted by a petition for ruling filed by equipment manufacturers and sellers who alleged that the North Carolina investigation would chill customers' desire to substitute their own equipment. *Id.* paras. 6-7.<sup>16</sup> However, the FCC had also been contemplating extension of its new "restricted competition" policy in the terminal equipment field, and *Telerent* provided an opportunity for it to assert broadly its own jurisdictional authority *vis-a-vis* that of the state agencies.<sup>17</sup>

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basic concern is that customer-substitution may permit certain customers, particularly large companies, to obtain lower rates by using their own equipment, but this in turn will require that ordinary business and residential users make up revenue losses suffered by the telephone companies through such substitution. See NARUC, *Report After Investigation*, May 1974.

<sup>16</sup> The FCC also ultimately considered rulings of the Nebraska Attorney General and the Oklahoma Corporation Commission affirming state requirements for certificates of public convenience and necessity in certain instances where customer supplied terminal equipment was utilized. Pet. App. 37b-38b.

<sup>17</sup> Following issuance of its *Telerent* decision, the FCC did in fact seek to extend its substantive policies to regulate pervasively the provision of terminal equipment. See pp. 18-19, below.

In February 1974, the FCC issued its Memorandum Opinion and Order in *Telerent*. 45 F.C.C.2d 204 (Pet. App. 1b). Over the objections of NARUC and numerous state commissions,<sup>18</sup> the FCC declared that its authority over "all interstate and foreign communication" permitted it to regulate connection of terminal equipment to local exchanges,<sup>19</sup> even though such terminal equipment has long been regulated by the state agencies, is used predominantly for intrastate and exchange communication and is generally provided under state tariffs as a part of intrastate and exchange service. While both Sections 2(b) and 221(b) specifically preclude FCC jurisdiction over "facilities used for or in connection with" intrastate or exchange service, the FCC asserted that these provisions were "primarily concerned with the protection of traditional State jurisdiction over intrastate rates and services . . . ." Pet. App. 29b.

The Court of Appeals for the Fourth Circuit affirmed the FCC's decision by a 2-to-1 vote. Pet. App. 1a. The majority opinion concluded that FCC authority to regulate terminal equipment was not clearly permitted or forbidden by the basic jurisdictional provisions of the

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<sup>18</sup> Among the state agencies opposing the FCC's decision were the Missouri Public Service Commission, the Public Utilities Commission of Ohio, the Maryland Public Service Commission, the North Carolina Utilities Commission, the Michigan Public Service Commission, the Oregon Public Utility Commissioner, the Washington Utilities and Transportation Commission, Public Service Commission of Wyoming, the Alabama Public Service Commission and the Tennessee Public Service Commission.

<sup>19</sup> Pet. App. 22b. The FCC does not in fact possess jurisdiction even over all "interstate" communications because of specific exclusions in the Act. See, e.g., Sections 2(b)(2), 3(e) (final proviso), and 221(b), 47 U.S.C. §§ 152(b)(2), 153(e) and 221(b).

Act,<sup>20</sup> so it relied on inferences from subordinate provisions and events. These included reliance on a qualifying provision in Section 2(b) (Pet. App. 10a-11a)—which is by its own terms plainly inapplicable to Section 2(b)(1)—and a mistaken understanding of both the legislative history of the Act and the long-continued state regulation of terminal equipment before and since its passage (Pet. App. 15a-16a). See pp. 25-36, below.

On petitions for rehearing, these and other crucial errors in the majority opinion were called to the Court's attention. However, in the absence of the author of the majority opinion, the petitions for rehearing were denied by a 1-to-1 vote. Pet. App. 1d.<sup>21</sup> Rehearing *en banc* was also denied on the stated ground that all other judges in active service in the Fourth Circuit were disqualified from sitting on the case. Pet. App. 1d.

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<sup>20</sup> The majority opinion apparently believed that regulation of terminal equipment fell both within the Act's language granting the FCC authority to regulate interstate communication (Sections 1 and 2(a)) and within the language of Section 2(b)(1) forbidding regulation of intrastate communication. Pet. App. 10a. The majority opinion failed to deal directly with the argument of the parties opposing FCC jurisdiction that, even assuming terminal equipment might otherwise be regulated under Sections 1 and 2(a), Sections 2(b)(1) and 221(b) constituted explicit exceptions overriding any otherwise applicable grant of FCC authority contained in other sections of the Act.

<sup>21</sup> Because of the disqualification of other Fourth Circuit judges, the panel consisted of Judge Widener from the Fourth Circuit and Judges Hastie and Tuttle from the Third and Fifth Circuits. Judge Hastie, the author of the majority opinion, subsequently passed away. Judge Widener wrote the dissenting opinion.

### REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case for two basic reasons. First, the nature of the jurisdictional issue in this case, its vastly important and far-reaching ramifications for the way telephone communications service will be provided in this country in the future, the extension of federal authority into an area long regulated by state agencies, and the need for a definitive decision on a matter of continuing importance all strongly and urgently support review by this Court. Thus, the case presents one of the single most important jurisdictional questions under the Communications Act ever to come before this Court, outweighing even the major jurisdictional issue considered by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

Second, the majority opinion has manifestly misconstrued the statutory plan and has ignored the plain language of Sections 2(b)(1) and 221(b) respected by the FCC for many years until its extraordinary about-face in the present case. See, e.g., *Kitchen v. FCC*, 464 F.2d 801 (D.C. Cir. 1972). The opinion disregards canons of construction repeatedly affirmed by this Court and reaches a result which is directly contrary to Congress' repeatedly expressed intent to preserve existing state jurisdiction. The decision also ignores this Court's warning that long-standing state regulation may not be displaced without the clearest evidence of Congressional purpose.

**I. Certiorari Should Be Granted Because of the Nature and Importance of the Jurisdictional Issue, Its Continuing Practical Impact in the Administration of the Act, and the Urgency of a Definitive Resolution.**

The FCC has in this case unequivocally determined that it can regulate broadly the connection of terminal equipment to local telephone exchanges and can override state regulation of the same subject matter except so far as the states adhere to the FCC's preferred policies. The majority opinion of the court below has sustained the FCC's construction over a vigorous dissent. By virtually every test applied by this Court in past cases accepted for review, the present case presents a profound legal issue of continuing importance meriting plenary consideration on certiorari.

1. The central legal issue posed is whether the FCC's assertion of preemptive jurisdiction is forbidden by Sections 2(b)(1) and 221(b) of the Communications Act. The issue is infinitely more basic and more far-reaching than the conventional preemption question whether a *particular* valid federal statute or agency regulation conflicts with and preempts a *particular* state statute or regulation. This case instead involves the threshold question of whether—under the statutory division of authority between the FCC and the states established by the Communications Act—the FCC has statutory jurisdiction to engage in valid preemptive regulation in the terminal equipment field.<sup>22</sup>

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<sup>22</sup> This is entirely a matter of federal statutory construction. The issue is not whether Congress *could* constitutionally have granted the FCC the power the agency seeks to exercise; the question is whether it *did* grant that power or whether it expressly and deliberately withheld this authority from the FCC under Sections 2(b) and 221(b) and reserved the authority to the states which have long exercised it.

The crucial statutory provisions are the keystone in the legislative structure established by Congress to divide regulatory power over telecommunications by common carrier between federal and state authorities. Sections 1 and 2(a) delineate the general scope of FCC authority, subject to major exceptions; Sections 2(b) and 221(b) qualify and confine that authority in unequivocal terms for deliberately conceived legislative reasons. The issue thus presented is profoundly a jurisdictional issue, and the construction of such statutory limitations is a matter on which Congress has given the courts—not the federal agency—"the final say." *Yonkers v. United States*, 320 U.S. 685, 689 (1944).

This case therefore presents precisely the type of "important question of regulatory authority" which this Court normally entertains. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). In *Southwestern Cable*, a case whose practical importance is dwarfed by the present controversy, this Court resolved the FCC's jurisdiction to regulate CATV systems. In *Regeants v. Carroll*, 338 U.S. 586 (1950), the Court reviewed the scope of FCC authority over nonlicensees. In a host of cases involving other federal agencies, this Court has recognized its responsibility to delineate the jurisdictional boundaries fixed for federal agencies by regulatory statutes including the Federal Power Act,<sup>23</sup> the Natural Gas Act,<sup>24</sup> and the Interstate Commerce Act.<sup>25</sup>

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<sup>23</sup> *FPC v. Conway Corp.*, 44 U.S.L.Wk. 4777 (June 7, 1976); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975).

<sup>24</sup> *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954); *FPC v. Transcontinental Pipe Line Corp.*, 365 U.S. 1 (1961); *California v. FPC*, 369 U.S. 482 (1962).

<sup>25</sup> *North Carolina v. United States*, 325 U.S. 507 (1945); *Florida v. United States*, 282 U.S. 194 (1931).

The majority opinion below did not suggest that the basic issue of FCC subject matter jurisdiction here presented was directly controlled by any prior decision of this Court. Indeed, the opinion cited not a single decision of this Court. Accordingly, in the language of this Court's rules, the case presents "an important question of federal law which has not been, but should be, settled by this court." S. Ct. R. 19(1)(b).<sup>26</sup>

2. A related reason for review here is the immense practical impact of the FCC's claim of jurisdiction. The immediate outcome of the decision is to declare invalid existing or anticipated actions in several individual states,<sup>27</sup> but the basic jurisdictional holding is a foundation for virtually any federal regulatory action respecting terminal equipment connection the FCC might wish to impose. In substance the FCC has asserted jurisdiction to regulate directly and pervasively connection of the over 100 million telephones and other pieces of terminal equipment in the United States, whether supplied by carriers or by customers.

Removing any doubt about the scope of its claim, the FCC has followed *Telerent* by recently promulgating, without further discussion of its jurisdictional author-

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<sup>26</sup> So far as decisions of this Court do illuminate the issue, they strongly counsel canons of statutory construction and presumptions of Congressional intent contrary to the approach and result adopted below in this case. See pp. 25, 34-36, below.

<sup>27</sup> After asserting its jurisdictional claim, the FCC examined a proposed rule being considered by the North Carolina Utilities Commission and held that, if adopted, it would be invalid. Pet. App. 37b. It held an existing rule of the Oklahoma Corporation Commission invalid in two different respects. *Id.* 39b-40b. Finally, it held in substance that an advisory ruling by the Attorney General of Nebraska is invalid (*id.*), although that ruling was ultimately overturned in state court.

ity, sweeping new regulations establishing a "registration program" for all terminal equipment connected to local exchanges in the United States.<sup>28</sup> This "registration program" purports to regulate almost every aspect of the connection of terminal equipment including the establishment of technical standards, procedures for connection, and regulation of both carrier-supplied and customer-supplied equipment. See Pet. App. 1f. The regulations would extend the FCC's jurisdiction to carrier-provided terminal equipment that has been supplied pursuant to state tariffs and without federal regulation for over 50 years and would contradict and supersede tariffs in practically every state.

Nor does the FCC regard the scope of *Telerent* as limited to terminal equipment. It has recently invoked *Telerent* in a decision declaring in substance that California and Oklahoma must permit specialized carriers to provide particular *intrastate* telephone services, contrary to orders of the state regulatory commissions, where the FCC has authorized the carriers to provide interstate services.<sup>29</sup> Relying directly on *Telerent*, the FCC rejected the proposition that regulation of intrastate service was reserved expressly to the state agencies by Section 2(b)(1). 56 F.C.C.2d at 20. Yet, Sections

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<sup>28</sup> The regulations, which comprise an entirely new part of the FCC's rules (Part 68), were first promulgated in 1975 and are reprinted for illustrative purposes as Appendix F to this petition. The validity of the substantive rules themselves is now the subject of new litigation in the Fourth Circuit, which has stayed their operation in most respects. The regulations are reprinted here simply to confirm that the broad jurisdictional claims asserted in *Telerent* underlie broad and continuing regulatory action going even beyond the particular state actions invalidated in *Telerent*.

<sup>29</sup> *AT&T*, 56 F.C.C.2d 14 (1975), *pet. for review pending sub nom. California v. FCC*, D.C. Cir., No. 75-2060 and consolidated cases.

2(b)(1) and 221(b) bar FCC regulation of intrastate and exchange "service" and "rates" in precisely the same paragraphs and the same terms as they bar FCC regulation of "facilities" used for or in connection with intrastate and exchange service.<sup>30</sup>

The state orders invalidated in *Telerent*, the FCC "registration program," and the intrastate services case are merely examples of the reach of the FCC's basic jurisdictional claim in *Telerent*. That claim can as readily be extended to impose effective federal control over intrastate and exchange rates, because the regulation of intrastate rates, of local service, and of terminal facilities are inextricably intertwined.<sup>31</sup> Even if *Telerent* were limited solely to terminal equipment, the jurisdictional claim—embracing as it does authority over 100 million telephones and other pieces of terminal equipment—fully warrants review by this Court.

3. Yet another reason for certiorari is that the FCC's intrusion on pre-existing state authority raises a delicate issue of federal-state relations that is especially appropriate for this Court's resolution. The Communications Act, like the Natural Gas Act earlier

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<sup>30</sup> Sections 2(b)(1) and 221(b) provide that, apart from Section 301, "nothing in this Act" empowers the FCC to regulate "charges, classifications, practices, facilities, or regulations" for or in connection with "intrastate" or "exchange" service.

<sup>31</sup> *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921). Dissenting below, Judge Widener observed: "Today we allow the FCC to regulate only a facility mentioned in the statute as reserved for State regulation. . . . No reason would then exist for the FCC not to regulate 'charges, classifications, practices [and] services,' other matters specifically reserved for State regulation by the same statute . . . ." Pet. App. 25a.

construed by this Court, was drawn with "meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle Eastern Pipe Line Co. v. Comm'n*, 332 U.S. 507, 517-18 (1947). This Court has repeatedly shown its concern and its willingness to grant review where federal power is invoked to override authority long claimed and exercised by the individual states.<sup>32</sup>

This imperative for Supreme Court review applies with special force where, as here, the federal agency action would invade a field long subject to pervasive regulation by the states. See pp. 6-9, above. As against occasional or limited FCC actions now alleged to provide a precedent for *Telerent* (see p. 31, below), it is indisputable that the states have regulated in plenary fashion and for many decades virtually all aspects of terminal equipment including customer-equipment connection.<sup>33</sup> *Telerent* itself purports to de-

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<sup>32</sup> *E.g.*, *Head v. New Mexico Board*, 374 U.S. 424 (1963); *Yonkers v. United States*, 320 U.S. 685 (1944); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963); *FTC v. Bunte Bros.*, 312 U.S. 349 (1941); *Maurer v. Hamilton*, 309 U.S. 598 (1940); *Rice v. Board of Trade*, 331 U.S. 247 (1947).

<sup>33</sup> See, *e.g.*, *City of Los Angeles v. Southern California Tel. Co.*, 2 P.U.R. (n.s.) 247 (Cal. R.R. Comm'n 1933) (interconnection of private telephone system to telephone network); *Quick Action Collection Co. v. New York Tel. Co.*, P.U.R. 1920D 137 (N.J. Bd. Pub. Util. Comm'rs 1920) (connection of privately owned equipment to carrier terminal equipment); *Jacobsen v. Northwestern Bell Tel. Co.*, 61 P.U.R.3d 541 (S.D. Pub. Util. Comm'n 1965) (connection of privately owned switching device to carrier line); *Peters Sunset Beach, Inc. v. Northwestern Bell Tel. Co.*, 60 P.U.R.3d 363 (Minn. R.R. & Whse. Comm'n 1964), *aff'd*, Minn. Dist. Ct. 8th Jud. Dist., Case No. 8529 (Aug. 17, 1966) (interconnection of private telephone system to telephone network); *Racine Flash Cab Co. v. Wisconsin Tel. Co.*, 65 P.U.R.3d 321 (Wis. Pub. Serv. Comm'n 1966) (interconnection of privately owned, automatic cab dispatch-

clare invalid existing and anticipated state actions, and it has since been drastically applied in the FCC's "registration program" to override tariffs filed with virtually all of the individual states.

Moreover, the telephone companies themselves are placed in an intolerable position by the FCC's attempt to supersede the plenary regulation long exercised by the states over terminal equipment. The FCC's preemption of jurisdiction over local exchange facilities cannot be divorced from state regulation of rates and services. State regulation of facilities, including terminal equipment, interrelates directly with state regulation of the rates for terminal equipment and all other services covered by state tariffs. It is manifestly unfair to subject the telephone companies to divided regulation of the very same local exchange terminal equipment. Congress recognized this interdependence in reserving jurisdiction to the states in Sections 2 (b)(1) and 221(b). Under the FCC's interpretation of the Act, the term "facilities" is simply torn out of the statutory phrase, contrary to the economic realities recognized by Congress in placing jurisdiction

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ing unit). See also, *e.g.*, *Gardner v. Providence Tel. Co.*, 49 A. 1004 (R.I.), *rehearing denied*, 50 A. 1014 (1901); *In re Telephone Companies*, P.U.R. 1915A 1032, 1046 (S.D. Bd. R.R. Comm'rs 1915); *Littlepage v. Mosier Valley Tel. Co.*, P.U.R. 1918E 425 (Ore. Pub. Serv. Comm'n 1918); *Re Farmers Fountain Tel. Co.*, P.U.R. 1926C 363 (Ill. Comm. Comm'n 1926); *Re Customers of the Concordia Tel. Co.*, 3 P.U.R. (n.s.) 522, 525 (Mo. Pub. Serv. Comm'n 1934); *King v. Pacific Tel. & Tel. Co.*, 16 P.U.R. (n.s.) 348 (Ore. Pub. Util. Comm'r 1936); *Electronic Detectors, Inc. v. New Jersey Bell Tel. Co.*, 62 P.U.R. 3d 186 (N.J. Bd. Pub. Util. Comm'rs 1965); *Western States Tel. Co. v. Pacific Tel. & Tel. Co.*, 64 P.U.R. 3d 527 (Cal. Pub. Util. Comm'n 1966); *Netsky v. Bell Tel. Co. of Pa.*, 65 P.U.R.3d 145 (Pa. Pub. Util. Comm'n 1966).

over "charges . . . services [and] facilities" in the same jurisdiction.

In addition, if the telephone companies fail to comply with FCC orders respecting terminal equipment, the FCC can seek sanctions and attempt to enforce compliance; and the states can seek to apply similar penalties through the state courts so far as the FCC-ordered actions are inconsistent with the existing state tariffs and state policy. Unless and until this Court resolves the issue in definitive terms, the potential for conflict between the FCC and state agencies will remain a continuing irritant to federal-state relations and will involve the real threat of conflicting and inconsistent regulation for the telephone companies."

The FCC's *Telerent* decision itself asserts that the jurisdictional question requires immediate resolution. Pet. App. 34b. The reasons it gave, involving the uncertainty created for equipment manufacturers by orders contemplated or entered in three states, have been strongly reinforced by subsequent developments. The "registration program," now being litigated in the Fourth Circuit, the FCC's action on California and Oklahoma intrastate services, now at issue in the District of Columbia Circuit, and other regulatory measures which will inevitably follow," make it vital

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" There is no indication that all of the states will permit the telephone companies to alter their tariffs to comply with the "registration program" or that state rules or orders such as those involved in *Telerent* will not be enforced.

" For example, in July 1976, the FCC published extensive new regulations establishing technical specifications for jacks and plugs which it requires be used for almost all future connections of tele-

to settle the FCC's jurisdictional authority at the earliest possible time.

4. This is, finally, an especially appropriate case for resolution of the jurisdictional issue. It raises the basic legal issue in a broad context where it has been squarely addressed by the FCC, the parties, and the majority and dissenting opinions below; and the legal issue is not skewed or distorted by dispute about the merits or wisdom of particular policies. This Court in *Southwestern Cable* adopted this very approach by resolving the FCC's jurisdiction over CATV at the outset and reserving for future decision questions of the merits of particular FCC regulations.<sup>36</sup>

**II. The Decision Below Fundamentally Misconstrues the Communications Act's Reservation of State Jurisdiction and Disregards Longstanding Rules of Statutory Construction Established by This Court.**

Certiorari is further justified in this case because of the basic legal errors in the majority opinion. The decision below sustaining the FCC's claim of jurisdiction is literally irreconcilable with the plain language of the Communications Act; it disregards settled canons of construction established by this Court;

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phones and other terminal equipment to local telephone lines. 41 Fed. Reg. 28694-782 (July 12, 1976).

<sup>36</sup> A full range of interested parties was represented below. These include telephone companies, manufacturers of terminal equipment, specialized carriers, user interests, the national association representing independent telephone companies, and the national organization representing state regulatory commissions, in addition to individual state agencies. The range of interests assures that all of the implications of the FCC's jurisdictional claims and all of the arguments fairly to be made for and against it will be available to the Court deciding this central issue.

it also disregards the unmistakable thrust of the legislative history and administrative practice for over four decades since the passage of the Act; and it fails to heed this Court's warning that longstanding state regulation is not to be displaced without the clearest evidence that Congress intended such displacement.

1. As this Court has repeatedly said, "it is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed . . . ." *Caminetti v. United States*, 242 U.S. 470, 485 (1917)." The FCC's decision in *Telerent* is directly inconsistent with the plain language of the Act's provisions:

Section 2(b)(1). "Subject to the provisions of section 301 [regarding the licensing of radio frequency uses], *nothing in this Act* shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, *facilities*, or regulations *for or in connection with intrastate communication service . . .*" (emphasis added).

Section 221(b). "Subject to the provisions of section 301, *nothing in this Act* shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, *facilities*, or regulations *for or in connection with . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communication . . .*" (emphasis added).

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<sup>27</sup> See also, e.g., *Flora v. United States*, 357 U.S. 63, 65 (1958); *United States v. Missouri P. R.R.*, 278 U.S. 269, 278 (1929).

The language of these sections controls the present case virtually phrase by phrase. The FCC is unquestionably seeking to "apply" the Act and to assert "jurisdiction" over terminal equipment and its connection to local exchanges, as the invalidation of state actions and the "registration program" plainly demonstrate. The reserved FCC jurisdiction under Section 301 has no application to ordinary terminal equipment.<sup>38</sup> Thus, the statutory prohibitions directly apply since it is clear that telephones and other pieces of terminal equipment are "facilities" used "for and in connection with" intrastate and exchange services.

In *Telerent* itself, the FCC admitted that the ordinary "station" set or telephone is part of "exchange plant" (Pet. App. 21b) and it has said the same thing on other occasions. See, *e.g.*, p. 32, below. Practically all terminal equipment is connected directly into the local exchange switching equipment, functions as an integral part of the exchange, and is used predominantly for intrastate and exchange communications. See pp. 5-7, above. Almost all such equipment is offered under state tariffs as part of intrastate and local exchange service.

The majority opinion, recognizing that Sections 2(b)(1) and 221(b) literally embraced terminal equipment, nevertheless believed that the capability of

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<sup>38</sup> Only a fraction of one percent of terminal equipment is represented by "mobile" radio-telephones which are generally installed in vehicles. While the user must obtain a license from the FCC under Section 301, generally the Section 301 power was not designed to go beyond radio licensing (see, *e.g.*, H.R. Rep. No. 910, 83rd Cong., 1st Sess. 1 (1953)), and the mobile telephones are normally offered under state tariffs. In any event Section 301 has no application to ordinary telephones and other terminal equipment, which do not require radio licensing.

practically all terminal equipment for interstate communication—albeit a small fraction of the time in most cases—also brought such equipment within the FCC's jurisdiction to regulate interstate communication." However, even assuming that ordinary terminal equipment might *otherwise* be within the scope of the FCC's authority under Sections 1 and 2(a), any such power is specifically withdrawn and negated by the language of Sections 2(b) and 221(b). By their precise terms—"nothing in this Act"—these provisions override and preclude the exercise of FCC authority over "facilities" within Sections 2(b)(1) and 221(b).

The fact that Congress specifically excepted the FCC's jurisdiction under Section 301 from the otherwise preclusive language of Sections 2(b)(1) and 221(b) confirms the overriding effect of these sections upon the grants of authority generally made in the Act. The inference is compelling that Congress fully appreciated that, without a specific reservation of the FCC's power under Section 301, the FCC's radio licensing power like any other general grant of authority in the Act would have been rendered inapplicable to facilities embraced by Sections 2(b)(1) and 221(b). If the majority opinion's analysis were cor-

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\*\* Although Sections 1 and 2(a) of the Act do refer to the FCC's jurisdiction over interstate communication, nothing in these sections even refers to "facilities." The reference to "facilities" relied on by the majority opinion appears in a separate definitional section (Section 3(a)) and is hardly an expression of Congressional intent to convey jurisdiction over terminal equipment. Compare Section 214, establishing FCC authority over interstate lines in unmistakable terms.

rect, the Section 301 reservation would have been wholly pointless.<sup>40</sup>

This preclusive effect of the reservation of state jurisdiction is confirmed by *Kitchen v. FCC*, 464 F.2d 801 (D.C. Cir. 1972), a decision ignored by the majority opinion and inconsistent with its reasoning. There the issue presented was whether the FCC had jurisdiction over a telephone exchange building based on the assertion that a portion of traffic switched through the facility was interstate and the facility was thus part of an interstate "line" under Section 214. Citing the language of Section 221(b) and its legislative history, the D.C. Circuit unanimously declared that "[e]ven if such buildings could be considered part of a 'line' within the meaning of Section 214(a), an exercise of jurisdiction would still be precluded by Section 221(b)." *Id.* at 803 (footnotes omitted).

2. The majority opinion's frustration of Congressional intent is a further forceful argument for certiorari. This disregard of the plain terms of the statute cannot be rescued by the resort to legislative history or

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<sup>40</sup> The majority opinion also relied on two other provisions of the Act, both of which are inapplicable on their face. It first emphasized (Pet. App. 10a) the concluding proviso of Section 2(b) which reserves the FCC's Section 201-05 powers for carriers "described in clauses (2), (3), and (4)"; but the majority opinion failed to note that this reservation is *not* made with respect to clause (1) of Section 2(b) or with respect to Section 221(b), which are the controlling provisions here. It later referred (Pet. App. 15a) to Section 410(c) as confirming federal preeminence in matters of interest to the states; but as the language and legislative history of Section 410(c) make clear, that preeminence is confined to matters otherwise within the FCC's jurisdiction (see, e.g., Section 410(c); S. Rep. No. 92-362, 92d Cong., 1st Sess. (1971)), which under Sections 2(b)(1) and 221(b) is not true of terminal equipment.

administrative practice as limiting the broad and unqualified language of Sections 2(b) and 221(b). What the legislative history actually shows is that the states rightly anticipated the FCC's eventual reach for preemptive power and that Congress responded to these concerns in Sections 2(b) and 221(b) by deliberately seeking to preclude FCC preemption.

As the Communications Act was initially proposed, the FCC would have had potential authority to intrude into areas that were the subject of active state regulation. Certain language in the original bills affected intrastate service, and the so-called *Shreveport* doctrine, allowing the ICC to regulate intrastate service to protect interstate commerce, foreshadowed similar expansion of FCC jurisdiction.<sup>41</sup> Thirty-seven states and their national association, which is the predecessor of NARUC, adopted resolutions opposing the original bill and vehemently opposed any legislation that might empower the FCC to supersede existing state jurisdiction in the communications field. *Hearings on S. 6 before the Senate Committee on Interstate Commerce*, 71st Cong., 1st Sess. 2167-68 (1930).

As the Senate Manager of the Communications Act explained in language already quoted in full (p. 8, above), the bills were revised to include "certain provisions" designed "to protect the State Commissions from being overridden by this Commission [the FCC] . . . ." The national association, satisfied that the bill had been now drawn to "safeguard State power to regulate," withdrew its opposition. *Hearings on H.R. 8301, Before the House Committee on Interstate and*

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<sup>41</sup> See *Houston, E. & W.T. Ry. v. United States*, 234 U.S. 342 (1912) (the *Shreveport* case); S. 6, § 35(c)-(d), 71st Cong., 1st Sess. 43-44 (1929), introduced 71 Cong. Rec. 102.

*Foreign Commerce*, 73rd Cong., 2d Sess. 136 (1934). The Senate report explicitly confirmed that the jurisdiction reserved to the states was to be "exclusive." S. Rep. No. 781, 73rd Cong., 2d Sess. 3 (1934).

The majority opinion brushed aside this legislative history, asserting that Congress was principally concerned with preserving existing state authority over "local telephone rates and charges." Pet. App. 13a, n.6. This provides no explanation, however, for Congress' inclusion of "facilities" in Sections 2(b) and 221(b), because both sections already contain the word "charges." Indeed, the majority opinion's construction would render the term "facilities" practically meaningless since, as the FCC has itself stressed (Pet. App. 21b), few pieces of terminal equipment can be used only for interstate or intrastate service. Thus, the construction below is also inconsistent with the obligation of courts to assure that "all of the words used in a legislative act are to be given force and meaning."<sup>42</sup>

After the passage of the Communications Act, the states continued their pervasive regulation of terminal equipment. Tariffs filed with the states govern the rates, regulations and conditions applicable to provision of terminal equipment including conditions for use of customer provided equipment. See pp. 6-9, above. Only in quite limited instances involving peculiar interstate relationships (such as interstate defense facilities) have particular pieces of terminal equipment been tariffed with the FCC, and its present jurisdictional claims are in no sense directed or limited to such a minute portion of terminal equipment.

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<sup>42</sup> *United States v. Standard Brewery Co.*, 251 U.S. 210, 218 (1921). See also, e.g., *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

In the face of this long continuing history of state regulation of terminal equipment, both before the Act and in the subsequent decades, the FCC's claim that there is a substantial history of FCC regulation of terminal equipment is frivolous. The FCC's claim, mistakenly accepted by the majority opinion (Pet. App. 15a-16a), rests on a scattering of clearly distinguishable cases<sup>43</sup> overshadowed by the FCC's own prior precedents to the contrary and the literally thousands of state tariffs and regulatory proceedings applicable to terminal equipment.<sup>44</sup>

Until the *Telerent* decision the FCC has never regarded the Act or its scattering of precedents (p. 31, n.43, above) as supporting any general jurisdiction over the telephone or similar pieces of terminal equipment. Indeed, as recently as 1973, the Chairman of the

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<sup>43</sup> In the *United States Department of Defense* case, *supra*, p. 9, n. 10, the FCC was concerned with dial restoration panels "primarily related to [an] interstate national defense purpose" which the FCC itself found "different in essential respects" from ordinary telephone sets. *Id.* at 813. *AT&T-TWX*, 38 F.C.C. 1127 (1965), involved teletypewriter equipment "predominantly interstate in its use" and the FCC held that the equipment did not pertain to "telephone exchange service." *Id.* at 1129, 1133-34. *Carterfone* involved not ordinary terminal equipment but a device "for interfacing the public telephone system with private mobile radio systems." 13 F.C.C.2d 432. Even that decision, like the other four cases cited by the majority opinion (Pet. App. 16a), carefully limited the FCC's assertion of jurisdiction to those uses of the devices in question for interstate and foreign operations, the very limitation which the FCC has specifically abandoned both in *Telerent* and in its registration program.

<sup>44</sup> The collection of cases cited at pp. 21-22, n. 33, above, is merely a sampling of state regulatory cases involving terminal equipment. In fact, state tariff filings and state administrative proceedings affecting terminal equipment go on all the time.

FCC responded to a Congressional inquiry about modification of the telephone by stating:

“[W]e . . . lack primary jurisdiction over telephone sets which are a primary part of the facilities used in providing exchange telephone service. As you know, the Communications Act specifically excludes the Federal Communications Commission from any authority with respect to charges, classifications, practices, services, facilities or regulations for or in connection with intrastate and exchange telephone services of any telephone company; such local service matters are subject to the regulatory authority of State commissions and the various states.” 119 Cong. Rec. 30962.<sup>45</sup>

Nothing has changed since 1973 except the FCC's present unwillingness to obey the statute; and the FCC's longstanding inaction and acquiescence in state regulation deserve substantial weight as compared with its “recent *ad hoc* contention as to how the statute should be construed.”<sup>46</sup>

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<sup>45</sup> The FCC in 1968 made essentially the same point in construing a parallel exemption: “When the Communications Act was enacted in 1934, Congress was concerned that the telephone might be considered an instrumentality of interstate commerce merely because of the circumstance that every telephone can be connected with a toll line for interstate calls. . . . Congress agreed with the USITA position that ‘the tail should not wag the dog.’” *General Telephone Co. of California*, 14 F.C.C.2d 695, 696 (1968).

<sup>46</sup> *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956); *Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 281 (1966). This Court further stated, in *FTC v. Bunte Bros.*, *supra*: “But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it is equally significant in determining whether such power was actually conferred.” 312 U.S. at 352.

3. The majority opinion below is mistaken in its basic approach to the common carrier provisions (Title II) of the Communications Act. It assumed both implicitly and explicitly that Congress empowered the FCC to exercise a general dominance over telephone policy in the United States, relegating the states to a subordinate and interstitial role.<sup>47</sup> The majority opinion failed to recognize that, whereas Congress may have established such a broad federal superintendence over broadcasting and radio transmission under Title III of the Act, it adopted a quite different and more restrictive approach in *dividing* authority over common carrier regulation in Title II.

Thus, Title III of the Act reflects the technological need for central control of the airwaves and of broadcasting; Section 301 in fact extends the radio licensing authority even beyond interstate communication to intrastate radio transmission that may merely interfere with interstate uses and Title III contemplates no substantial role for direct state regulation. By contrast, numerous limitations on the Title II powers of the FCC reflect the predominantly local use of telephone service and the intention to preserve existing, comprehensive state regulation. Congress not only expressly reserved intrastate and exchange matters to the states, but it withheld from the FCC jurisdiction over telephone matters that are explicitly interstate by the very terms of the Act. See, *e.g.*, Section 221(b).<sup>48</sup>

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<sup>47</sup> The majority opinion specifically relies, for example, on the FCC's alleged "plenary jurisdiction" over interstate and foreign services, the supposed need for "comprehensive regulation," and federal predominance purportedly reflected in Section 410(c). Pet. App. 12a, 15a, 18a.

<sup>48</sup> Titles II and III had quite different origins. The latter was largely a re-enactment of the Radio Act of 1927, with regulatory

Thus, like the Natural Gas Act, Title II was framed to create a plan of *dual* federal and state regulation, federal power “being complementary in its operation to . . . [the regulatory schemes] of the states and in no manner usurping their authority.” *Panhandle Eastern Pipe Line Co. v. Comm’n*, 332 U.S. 507, 520 (1947).

The common carrier matters reserved to the states were not deemed minor or trivial: they included *inter alia* all “charges, classifications, practices, services, facilities, or regulations” for or in connection with intrastate or exchange telephone service; and Congress well knew that intrastate and exchange telephone communications represented “97½ or 98 percent” of the business.<sup>49</sup> The emphatic language chosen by Congress to preserve this state jurisdiction did not contemplate that the FCC could override state policies in the reserved area. The Act was specifically designed, in light of experience with railroad regulation, to prevent that result by retaining “exclusive” jurisdiction in the states. S. Rep. No. 781, *supra*, at 3.

Even under Title III, this Court has cautioned that claims of federal preemption “cannot be judged by

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power over broadcasting being transferred from the Commerce Department to the new agency. Although there had been limited, dormant ICC power to regulate telephone companies, Title II was essentially a new measure.

<sup>49</sup> 78 Cong. Rec. 10816. As both the FCC (Pet. App. 21b) and the opinion below (Pet. App. 9a) have admitted, Congress was equally aware that, despite this predominant intrastate usage, practically all terminal equipment could be used intermittently for interstate use. *Doniphan Tel. Co. v. AT&T*, 34 F.C.C. 950, 967 (1962), *aff’d*, 34 F.C.C. 949 (1963). Yet Congress deliberately chose to reserve intrastate and exchange matters to the states and to include the term “facilities” in addition to the term “charges” in Sections 2(b)(1) and 221(b).

reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act." *Head v. New Mexico Board*, 374 U.S. 424, 429-30 (1963) (footnote omitted). Under Title II the very notion of "comprehensive" federal regulation is inapplicable when the issue presented is the FCC's power *vis-a-vis* state regulation.<sup>50</sup> Thus, the implicit and explicit reliance by the majority opinion in this case on the supposed intent to confer "plenary jurisdiction" and assure "comprehensive regulation" (Pet. App. 12a, 18a) is both incomprehensible and patently erroneous.

4. Lastly, the majority opinion ignored this Court's repeated warning that state and local control over matters long regulated at that level should not be superseded without the clearest expression of Congressional intent. "As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated . . . ."<sup>51</sup> This rule simply reflects Congress' own policy of preserving state authority over "matters heretofore traditionally

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<sup>50</sup> See *Kitchen v. FCC*, 464 F.2d 801 (D.C. Cir. 1972) (Section 221(b)); *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (Section 2(b)(1)); *Southwestern Bell Tel. Co. v. United States*, 45 F. Supp. 403 (W.D. Mo. 1942) (Section 221(b)). It is notable that this Court's references to the broad scope of FCC powers refer almost invariably to its powers over broadcasting and CATV, both of which are regulated under Title III. See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

<sup>51</sup> *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940). See also numerous cases cited at p. 21, n. 32, and quotations below. In *Maurer*, the Court took particular note of Congress' rejection of broader language in framing the statute in question (*id.*), which parallels Congress' treatment of the Communications Act. Compare pp. 29-30, above.

left to local custom or local law.” *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 354 (1941).

Assuredly, there is no “clear and manifest purpose of Congress”<sup>52</sup> to oust state control over terminal equipment. On the contrary, the language of the Act, its structuring of Title II authority, its legislative history, and administrative practice since its passage show that Congress intended state regulatory power to “remain unimpaired.” 373 U.S. at 152. The lower court’s approach to the statutory construction question is thus inconsistent with the decisions of this Court—decisions which were cited to the court below but which the majority opinion did not even discuss.

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<sup>52</sup> *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963), quoting *Rice v. Board of Trade*, 331 U.S. 247 (1947).

### CONCLUSION

For the reasons stated, certiorari should be granted and the case set for plenary review by this Court.

Respectfully submitted,

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September 1976

Supreme Court U. S.  
FILED

SEP 3 1976

No. **76-332**

ROBERT H. ROSEN, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, CON-  
TINENTAL TELEPHONE CORPORATION, UNITED TELEPHONE  
COMPANY OF THE CAROLINAS and the UNITED STATES  
INDEPENDENT TELEPHONE ASSOCIATION, ET AL.,

*Petitioners,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION and the UNITED  
STATES OF AMERICA, ET AL.,

*Respondents.*

**APPENDIX TO PETITION  
FOR A WRIT OF CERTIORARI**

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September 1976



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## APPENDIX A



UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

Nos. 74-1229; 74-1390; 74-1449; 74-1514; 74-1515; 74-1516.  
No. 74-1220

The North Carolina Utilities Commission,  
*Petitioner,*

Southeastern Association of Regulatory Utility  
Commission, *Intervenor.*

versus

The Federal Communications Commission and the United  
States of America, *Respondents.*  
International Telephone and Telegraph Communications,  
*Intervenor.*

Southern Pacific Communications Company,  
*Intervenor.*

Data Transmission Company,  
*Intervenor.*

National Retail Merchants Association, Inc.  
*Intervenor.*

International Business Machines Corporation,  
*Intervenor.*

Southeastern Association of Regulatory Utility  
Commissioners, *Intervenor.*

Computer and Business Equipment Manufacturers Assoc.  
(CBEMA), *Intervenor.*

Utilities Telecommunications Council,  
*Intervenor.*

MCI Telecommunications Council,  
*Intervenor.*

Telerent Leasing Corporation; Crescent Industries, Inc.;  
Long Engineering Company; Petty Communications, Inc.;  
Tele-Sound Company, Inc.; Telephone Interconnect  
Company; North American Telephone Association,  
*Intervenor.*

Central Committee on Communication Facilities of the  
American Petroleum Institute, *Intervenor.*

Remote Processing Services Section of the Association of  
Data Processing Service Organizations, Inc.,  
*Intervenor.*

Aeronautical Radio, Inc.; Air Transport Association of  
America, *Intervenor.*

No. 74-1390

Carolina Telephone and Telegraph Company and United  
Telephone Company of the Carolinas, Inc., *Petitioners.*

versus

Federal Communications Commission and the United  
States of America, *Respondent.*

National Retail Merchants Association, Inc.,  
*Intervenor.*

The North America Telephone Association,  
*Intervenor.*

No. 74-1449

American Telephone and Telegraph Company and  
Associated Bell System Companies, *Petitioners,*

versus

Federal Communications Commission and The United  
States of America, *Respondents.*

National Retail Merchants Association, Inc., MCI  
Telecommunications Corporation, and Southern Pacific  
Communications Company, *Intervenors.*

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Telerent Leasing Corp.; Crescent Industries, Inc.; Long Engineering Company; Petty Communications, Inc.; Tele-Sound Company, Inc.; North American Telephone Assoc.,  
*Intervenor.*

No. 74-1514

National Association of Regulatory Utility Commissioner,  
*Petitioner,*

versus

Federal Communications Commission and United States of America, *Respondents.*

and

Southern Pacific Communications Company, MCI Telecommunications Corporation, The National Retail Merchants Association, Inc., and North American Telephone Association, *Intervenor.*

No. 74-1515

United States Independent Telephone Association,  
*Petitioner,*

versus

Federal Communications Commission, and United States of America, *Respondents.*

and

Southern Pacific Communications Company, MCI Telecommunications Corporation, The National Retail Merchants Association, Inc., and Telerent Leasing Corporation, et al, *Intervenor.*

No. 74-1516

Continental Telephone Corporation,  
*Petitioner,*

versus

Federal Communications Commission and United States  
of America, *Respondents.*

MCI Telecommunications Corp.,  
*Intervenor.*

National Retail Merchants Association, Inc.,  
*Intervenor.*

The North American Telephone Association,  
*Intervenor.*

On Petitions for Review of an Order of  
The Federal Communications Commission

Argued September 22, 1975

Decided April 14, 1976

Before HASTIE \* and TUTTLE,\*\* Senior Circuit Judges,  
and WIDENER, Circuit Judge.

Edward B. Hipp, (Maurice W. Horne and Jerry B. Fruitt on brief) for Petitioner North Carolina Utilities Commission in case no. 74-1220; Carl E. Sanders and (Norman L. Underwood on brief) for Intervenor Southeastern Association of Regulatory Utility Commissioners in case no. 74-1220; Thomas J. O'Reilly, (Chadbourne, Parke, Whiteside, and Wolff on brief) for Petitioner United States Independent Telephone Association in case no. 74-1515; (Warren E. Baker, Richard J. Croker and Carolyn C. Hill

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\* Senior United States Circuit Judge William H. Hastie of the United States Court of Appeals for the Third Circuit.

\*\* Senior United States Circuit Judge Elbert Parr Tuttle of the United States Court of Appeals for the Fifth Circuit.

on brief) for Petitioners Carolina Telephone and Telegraph Company and United Telephone Company of the Carolinas, Inc. in case no. 74-1390; (George D. Gibson, John W. Riely, John H. Shenefield, Gary V. McGowan, F. Mark Garlinghouse, Harold J. Cohen, Charles Ryan, Alfred C. Partoll, Richard Partridge, Hunton, Williams, Gay and Gibson on brief) for Petitioners The Bell System Companies in case no. 74-1449; (Irwin Schneiderman, Donald J. Mulvihill, Laurence T. Sorkin, Joel C. Balsam, Michael J. Klosk, Cahill, Gordon and Reindel on brief) for Petitioner Continental Telephone Corporation in case no. 74-1516; Joseph A. Marino, Associate General Counsel, United States Department of Justice, (Thomas E. Kauper, Assistant Attorney General, Seymour H. Dussman, Attorney, Ashton R. Hardy, General Counsel, John E. Ingle, Counsel, United States Department of Justice, on brief) for Respondent Federal Communications Commission in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; Edwin B. Spievack, (Victor J. Toth, Cohn and Marks, Keller and Heckman on brief) for Intervenor Telerent Leasing Corporation, North American Telephone Association, et al., in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; Charles R. Cutler, (John L. Bartlett, John B. Wyss, Kirkland, Ellis and Rowe, on brief) for Intervenor Aeronautical Radio, Inc. in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (James E. Landry on brief) for Intervenor Air Transport Association of America in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; David Anderson, (J. Roger Wollenberg, William T. Lake, Neil J. King, Neal M. Goldberg, Wilmer, Cutler and Pickering, J. Gordon Walter on brief) for Intervenor International Business Machines Corporation (IBM) in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Kevin H. Cassidy, James T. Roche, and John M. Scorce on brief) for Intervenor Data Transmission Company in case no. 74-1220; (William H. Borghesani, Jr., Keller and Heckman on brief) for Inter-

venor National Retail Merchants Association, Inc. in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Joseph M. Kittner, Edward P. Taptich, McKenna, Wilkinson and Kittner, John S. Voorhees, Howrey, Simon, Baker and Murchison on brief) for Intervenor-Respondent Computer and Business Equipment Manufacturers Association (CBEMA) in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Charles M. Meehan on brief) for Intervenor Utilities Telecommunications Council in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Robert E. McKee, David M. Clark, Clark, Tanner and Williams on brief) for Intervenor International Telephone and Telegraph Corporation in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515 and 74-1516; (Herbert E. Marks, Stephen R. Bell, Wilkinson, Cragun and Barker on brief) for Intervenor Remote Processing Services Section of the Association of Data Processing Service Organizations, Inc. in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Joseph E. Keller, Wayne V. Black, Keller and Heckman on brief) for Intervenor Central Committee on Telecommunications of the American Petroleum Institute in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Michael H. Bader, Kenneth A. Cox, William J. Byrnes, John Wells King, Haley, Bader and Potts on brief) for Intervenor MCI Telecommunications Corporation in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Herbert E. Forrest, Steptoe and Johnson, Thormund A. Miller and Richard S. Kopf on brief) for Intervenor Southern Pacific Communications Company in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516.

*HASTIE, Circuit Judge.*

This controversy began with a petition in which several manufacturers and distributors of communications equipment asked the Federal Communications Commission (hereinafter, FCC or the Commission) to rule that state

regulatory agencies are precluded from restricting or regulating the interconnection of customer-provided equipment to the customer's individual subscriber station and line in any way that conflicts with the Commission's regulation of the same subject matter. The petition recited that the North Carolina Utilities Commission had given public notice of a proposed rule to prohibit such connection of customer-provided equipment in that state, except for use exclusively with facilities separate from those used in intrastate communication.<sup>1</sup> It also was alleged that the Attorney General of Nebraska had advised the Nebraska Public Service Commission that rulings of FCC did not control the attachment of customer-provided equipment to telephone facilities used for intrastate communication. The same opinion stated that approval of the state regulatory authority was necessary before a motel could lawfully connect its own internal communications equipment to its telephone subscriber station.

In these circumstances the Commission utilized the proceedings on the equipment manufacturers' petitions to provide the industry, concerned state agencies and the public with a definitive declaratory ruling<sup>2</sup> on the extent to which

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<sup>1</sup> In adjudicating this controversy, FCC took notice of a somewhat similar regulation recently adopted by the Oklahoma Corporation Commission.

<sup>2</sup> We have considered and have found no merit in an argument that the Commission's resort to a declaratory order was premature and unwarranted because state agencies are merely threatening to prohibit or restrict the use of customer-provided terminal equipment and have not yet imposed any such restriction as the proceeding now pending before the North Carolina Utilities Commission is designed to accomplish.

Unlike United States district courts, federal administrative agencies are not restricted to adjudication of matters that are "cases and controversies" within the meaning of Article III of the Constitution. Sections 4(i) and (j) and 403 of the Communications Act confer upon FCC broad power to issue orders appropriate for

it asserts and is exercising primary authority, upon which state agencies may not encroach, over the terms and conditions that govern the interconnection of customer-provided equipment to the subscriber's telephone terminal. After adequate notice and consideration of written or oral submissions by some 46 interested parties, the Commission issued the order that is now here for review.<sup>3</sup> *In the Matter of Telerant Leasing Corp., et al.*, 1974, 45 F.C.C. 2d 204.

As the agency established by the Communications Act of 1934, 47 U.S.C. § 151, to administer the provisions of that statute, the Federal Communications Commission is em-

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the performance of its functions under the Act. And section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), provides that an administrative agency such as FCC, "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty".

In paragraph 22 of its memorandum opinion in this case the Commission has asserted that "[t]he course being pursued by . . . [North Carolina Utilities Commission] and the Attorney General of Nebraska, and possibly other States, is a source of great controversy and confusion for manufacturers and users of customer-provided communications equipment and also casts doubt on the . . . application and effect of . . . tariffs on file with this Commission. . . . We would be remiss in the discharge of our broad statutory responsibilities to remain passive in the face of the policy and regulatory confusion which permeates the entire field of interconnection . . . ". 45 F.C.C.2d 204, 214. The record amply supports this statement. In this connection, it appears without contradiction that the market for customer-provided communications equipment has expanded rapidly in recent years and now is being affected adversely by the state threat of new restrictions upon interconnections.

We have no doubt that the matters presented in this proceeding were ripe for consideration and appropriate for disposition by declaratory ruling.

<sup>3</sup> Six petitions for review have been filed in or transferred to this court where they have been consolidated for hearing and decision.

powered, in the language of section 1 of the Act,<sup>4</sup> to regulate interstate and foreign commerce in communication by wire and radio "so as to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." By comprehensive definition of "communication by wire", section 3 makes it explicit that the subject matter of the Commission's jurisdiction includes "all instrumentalities, facilities, apparatus, and services . . . incidental to . . . [interstate] transmission" by wire.

On the other hand, section 2 both restates the applicability of the Act to "all interstate and foreign communications by wire or radio" and specifies that it shall not "be construed to apply to or give the Commission jurisdiction with respect to "(b) (1) . . . facilities or regulations for or in connection with intrastate communication service . . . of any carrier. . . ."

Terminal equipment that is connected to a telephone subscriber's station and line does in fact connect with the national telephone network. Usually it is not feasible, as a matter of economics and practicality of operation, to limit the use of such equipment to either interstate or intrastate transmissions. In paragraph 26 of the decision from which these appeals have been taken, the Commission has described the underlying realities as follows:

" . . . exchange plant, particularly subscriber stations and lines, is used in common and indivisibly for all local and long distance telephone calls. There is no interstate message toll telephone service either offered or practically possible except over exchange plant used for both intrastate and interstate and foreign service." 45 F.C.C. 2d 204, 215.

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<sup>4</sup> Section 1 of the Act is numbered § 151 in the United States Code. Throughout this opinion sections of the Act will be designated by their original numbers.

Although some appellants have expressed disagreement with this finding, we find no basis for challenging it.

It follows that the Commission's present assertion of jurisdiction over the interconnection of customer provided equipment to the nation-wide network unavoidably affects intrastate as well as interstate communication. And, by the same token, both would be restricted by any state action that prevented such interconnection. Thus, the language of sections 1 and 2 that both grants the Commission authority to regulate facilities of interstate communication and withholds authority to regulate facilities of intrastate communication creates the present dispute but, considered alone, does not resolve it.

In these circumstances it is relevant and helpful to consider other provisions of the Communications Act. By force of a heretofore unmentioned concluding clause of section 2(b), not only telephone companies with lines that extend interstate but also those local companies that provide interstate service solely through connection with the lines of telephone companies that are unrelated to them, are expressly made amenable to the regulatory provisions of sections 201 through 205 of the Act. All of the telephone companies parties to this suit are thus integrated into the national network and subject to the provisions of sections 201 through 205. More particularly, under section 201, charges and practices for and in connection with interstate service must "be just and reasonable". Section 202 makes unlawful any "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services. . . ." Section 203 requires carriers to file with the Commission their tariff schedules for interstate communication service "showing the classifications, practices, and regulations affecting such charges". Sections 204 and 205 prescribe the manner in which the Commission shall administer and implement the requirements of the preceding sections, approving or invalidating tariffs as may

be appropriate. It is in connection with the Commission's efforts to discharge its responsibilities under sections 201 through 205 and the alleged frustrating effect of countervailing state action that this controversy about jurisdiction over the attachment of customer-provided equipment has arisen.

Historically, a telephone company's restrictions, requirements and other regulations concerning customer provided equipment have been published and effectuated through inclusion in interstate tariffs. Some years ago, tariffs published by American Telephone and Telegraph Co. (hereinafter, AT&T), acting for itself and other concurring carriers throughout the nation, forbade the subscriber to connect to his line any device or equipment not furnished by the telephone company. As defendant in a consequent antitrust suit by a manufacturer of a terminal device, AT&T successfully urged that the suit was premature because of the primary jurisdiction of FCC over the question of the lawfulness of the inclusion of this restriction in the controlling tariff.<sup>5</sup> This led to a formal FCC proceeding for determination whether the tariff contained any unreasonable or unlawfully discriminatory restriction.

In its ensuing decision the Commission held that the tariff's blanket and unqualified prohibition of the interconnection of customer provided equipment was unreasonable and unjustifiably discriminatory, hence invalid under sections 201 and 202 of the Act. *Carterfone v. AT&T*, 1968, 13 F.C.C. 2d 420, *reconsideration denied*, 14 F.C.C. 2d 571. At the same time the telephone companies were authorized,

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<sup>5</sup> *Carter v. AT&T Co.*, N.D.Tex. 1966, 250 F. Supp. 188, 190, *aff'd*, 5th Cir. 1966, 365 F.2d 486, *cert. denied*, 386 U.S. 937. Although litigants, like courts, may experience a change of mind, it is noteworthy that AT&T's present position seems to be, that FCC has no jurisdiction, the antithesis of primary jurisdiction, over terminal equipment that is used for both interstate and intrastate communication.

without any particularizing directive, to file new tariffs regulating the use of customer-provided equipment. They did so, and the Commission reviewed the tariffs and permitted them to become effective. See *In the Matter of AT&T "Foreign Attachment" Tariff Revisions*, 1968, 15 F.C.C. 2d 605, *reconsideration denied*, 18 F.C.C. 2d 871.

The coverage of one of the approved new tariffs, F.C.C. No. 263, which, as subsequently amended, remains in effect, is relevant to the present dispute. It authorizes and regulates the connection and use of customer-provided terminal equipment with telephone company facilities for long distance message communication. It covers both data and voice transmitting and receiving terminal equipment, as well as mechanically attached accessories. Provision also is made for the connection of customer-provided communications systems with the interstate telephone network. At the same time, various safeguards are required. Thus, with few exceptions, the tariff provides that access to the telephone network must be through a telephone company supplied network control signaling unit, which serves as a protective interface. Far from surrendering jurisdiction over alternative means of access, the Commission postponed, pending further engineering and technical study, decision whether and what customer-provided signalling devices should be approved.

If, as North Carolina is formally proposing and the Attorney General of Nebraska has held to be permissible, state jurisdiction over intrastate communication facilities is exercised in a way that, in practical effect, either prohibits customer-supplied attachments authorized by tariff F.C.C. No. 263 or restricts their use contrary to the provisions of that or any other interstate tariff, the Commission will be frustrated in the exercise of that plenary jurisdiction over the rendition of interstate and foreign communication services that the Act has conferred upon it. The Commission must remain free to determine what

terminal equipment can safely and advantageously be interconnected with the interstate communications network and how this shall be done.

We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205.\* In this view of the interrelation of the

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\* To support their contentions about the intended effect of section 2(b), the opposing parties have cited particular statements made in Congressional committee reports, or on the floor during debate, or by witnesses during the 1934 Senate and House hearings on the then newly proposed federal communications legislation. These references certainly show concern that, as a result of the so-called *Shreveport* rate decision, *Houston, E.&W. Texas Ry. v. United States*, 1914, 234 U.S. 342, the Interstate Commerce Commission had been able to deprive state authorities of almost all regulatory power over intrastate rail transportation. And there was rather general agreement that this should not be done by the new federal commission in the communications field. However, it is equally clear that such little particularization as appears in the various statements of state concerns focuses upon the desire of state authorities to regulate local telephone rates and charges. See the statements of Mr. Clardy and Mr. McDonald, both senior officers of the National Association of Railroad and Utilities Commissioners, Hearings on S.2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 155, 156. Of course, rate making typifies those activities of the telephone industry which lend themselves to practical separation of the local from the interstate in such a way that local regulation of one does not interfere with national regulation of the other. Focusing upon this type of local regulation, members of Congress and the witnesses they heard did not discuss the impact, if any, of section 2(b) on the type of regulation we now are considering. However, one of the above men-

provisions of the Act, the Commission's declaratory statement of its primary authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the Act. *Cf. G.T.E. Service Corp. v. F.C.C.*, 2d Cir. 1973, 474 F.2d 724, approving an FCC ruling that prohibited telephone companies, including those that engaged primarily in local exchange service and participated in interstate service only through connection with other unrelated carriers, from engaging in the data processing business.

We are all the more confident of this because, elsewhere in the Act itself, Congress has recognized the existence of areas of common national and state concern and has provided a procedure under which national primacy is recognized, yet the Commission is authorized to receive and consider information, views and proposals from concerned state agencies that may aid it in reaching informed and

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tioned industry witnesses, Mr. Clardy, did make this perceptive comment:

"... [W]e now have a great deal of difficulty in saying what is interstate and what is intrastate property... because every exchange and every piece of machinery and all help and everything else, may at any moment be carried over exclusively, temporarily at least, into interstate business. There has got to be some new philosophy developed, perhaps, by this Commission to assist the State commissions in proper determination. . . ." Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d sess. 73.

In our view, the legislative history of the Act furnishes no impressive guidance for our determination of the reach of section 2(b). In any event, we are satisfied that it is not inconsistent with the view that the purpose of section 2(b) is to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network.

wise decisions. More particularly, section 410(c) of the Act confers upon the Commission discretionary power to refer any matter "relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board" of four state and three federal Commissioners for examination and for preparation of a recommended FCC decision. It even is required that the state members of a Joint Board shall participate, without vote, in the Commission's consideration of the Board's recommendation. We find it very difficult to square this Congressional design with the present contention that section 2(b) is intended to deprive the Commission of jurisdiction over the use of facilities that necessarily serve both interstate and intrastate communications. We think the Commission has acted properly in this case by resolving the challenge to its jurisdiction and at the same time proceeding separately, as it has,<sup>7</sup> to utilize the Joint Board procedure as an aid to sound resolution of interconnection problems that emerge in this period of developing technology and increasing demand.

It also is significant that for many years FCC, rejecting the argument that section 2(b)(1) deprives it of control over terminal facilities and equipment used in connection with both interstate and intrastate communications, has repeatedly exercised such jurisdiction. As early as 1947, FCC directed telephone companies to file tariff regulations that would permit the connection of recording devices to telephone receivers under specified conditions. *Use of Recording Devices*, 11 F.C.C. 1033. For present purposes the significant circumstance is that in its opinion the Commission discussed and rejected a contention of the Bell

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<sup>7</sup> See Interstate and Foreign MTS and WATS, Docket 1958, initiated 35 F.C.C. 2d 539, 543 and broadened by supplementary orders. See also the pending inquiry as to economic implications of customer interconnection policies at Docket 20003, F.C.C. 74-344, April 1974.

Systems that "facilities which are used for interstate and intrastate services are excluded from the Commission's jurisdiction as 'facilities . . . for or in connection with intrastate communication', as that term is used in Section 2(b)(1) of the Communications Act". 11 F.C.C. at 1046. A subsequent opinion pointed out that "[w]ere the Commission to exercise its jurisdiction only where the telephone facilities in question were exclusively interstate in character, it would result in virtually complete abdication from the field of telephone regulation . . . ." *Katz v. A.T.&T.*, 1953, 43 F.C.C. 1328, 1332, 8 Pike & Fischer Radio Reg. 919, 923.

More recent decisions also regulate terminal facilities or attachments used in both intrastate and interstate commerce. *E.g.*, *United States Department of Defense v. General Telephone Co.*, 1973, 38 F.C.C. 2d 803, *aff'd* F.C.C. No. 73-854; *AT&T—TWX*, 1965, 38 F.C.C. 1127, 1133; *AT&T—Railroad Interconnections*, 1962, 32 F.C.C. 33; *Hush-A-Phone Corp. v. AT&T*, 1957, 22 F.C.C. 112.

Congress cannot have been unaware that for some 30 years FCC has viewed and treated section 2(b)(1) of the Act as imposing no bar to its exercise of jurisdiction over facilities used in connection with both intrastate and interstate telephone communications. Significantly, it was as recently as 1971 that Congress amended the Act by adding the present section 410(c)<sup>8</sup> with its discretionary Joint Federal-State Board procedure that already has been discussed. We think it likely that Congress would have taken quite different action to restrict the Commission's jurisdiction and assure state primacy if, in its view, the Commission had long and repeatedly been exceeding its jurisdiction and impinging upon an area which Congress had intended for exclusive state control.<sup>9</sup>

<sup>8</sup> Pub.L. 92-131, 85 Stat. 363.

<sup>9</sup> The Senate Committee Report on this bill, S.Rep. No. 92-362,

One additional contention merits brief discussion.<sup>10</sup> Some of the petitioners argue that the Commission's action in this case violates a jurisdictional limitation imposed by section 221 of the Act which provides in part:

"(b) . . . [N]othing in this Act shall be construed . . . to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire . . . exchange service, . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

For present purposes it suffices to point out that the legislative history indicates that this restriction is intended to do no more than to prevent the circumstance that a single telephone exchange serves an area that includes parts of more than one state from enlarging the jurisdiction of FCC over the business and facilities of that exchange.<sup>11</sup> To put the matter affirmatively, by force of sec-

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92d Cong., 1st Sess., makes it clear that need for the proposed new section 410(c) procedure grew out of the circumstance that, while the "Federal Government regulates interstate carrier services [and] . . . the States exercise jurisdiction over intrastate toll and local exchange services, the plant facilities are to a great extent the same for both. The household telephone instrument, for example, is the same whether the call is made intrastate or interstate". 2 U.S. Code Cong. & Adm. News, 92d Cong. 1st Sess., 1971 at 1511.

<sup>10</sup> All other points made by any petitioner and not discussed in this opinion have been considered and found to lack merit.

<sup>11</sup> Mr. Rayburn, presenting the 1934 bill on the floor of the House, explained that section 221(b) "is designed to cover cases of cities located within two States, as Texarkana". 78 Cong. Rec. 10314. Similarly, on the Senate floor, Senator Dill, explaining the reach of the amendment, cited the uncertain status of metropolitan Washington and New York areas as essentially local exchanges that

tion 221(b) a local carrier that serves a single multi-state exchange area is assured whatever degree of freedom from federal regulation section 2(b) provides for uni-state carriers and intrastate telephone business generally.

In sum, all of the foregoing considerations make appropriate for this case Judge (now Chief Justice) Burger's admonition that the Communications "Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole". *General Telephone Co. of California v. F.C.C.*, D.C. Cir. 1969, 413 F.2d 390, 398, *cert denied*, 396 U.S. 888.

The Commission's Memorandum Opinion and Declaratory Order are sustained as reasonable administrative action within its statutory jurisdiction

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WIDENER, Circuit Judge, concurring and dissenting:

I respectfully dissent from that part of the court's opinion which determines that the FCC has primary jurisdiction over the interconnection of customer-provided equipment to the subscriber's telephone terminal. Should the statutory jurisdictional hurdle be overcome, I would concur in the balance of the opinion.

During the hearings before the House Committee on Interstate and Foreign Commerce and the Senate Committee on Interstate Commerce, it was repeatedly pointed out that § 221(b), 47 USC § 221(b), was included in order to protect the jurisdiction of the States over intrastate

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crossed state lines. 78 Cong. Rec. 8823. The Committee reports in both the Senate and the House are explicit in saying that section 221(b) is intended to enable state commissions "to regulate exchange services in metropolitan areas overlapping State lines". S. Rep. No. 781, 73rd Cong. 2d Sess., 5; H.R. Rep. No. 1850, 73rd Cong., 2d Sess., 7.

telephone communications. This section, an intentional subtraction from the then existing power of the Interstate Commerce Commission, was designed to overcome the effects of the *Shreveport* rate case, 234 US 342 (1914), so far as telephone communications were concerned. See Statement of Dr. Irvin Stewart, member of the interdepartmental committee on communications, Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 12, 16-18 (1934) (hereinafter House Hearings); statement of F. B. MacKinnon, President of the United States Independent Telephone Association, House Hearings 248; statement of K. F. Clardy, Chairman of the Legislative Committee of the National Association of Railroad and Utilities Commissioners, House Hearings 74; Statement of Andrew R. McDonald, National Association of Railroad and Utilities Commissioners, Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 156 (1934) (hereinafter Senate Hearings).

Congress was well aware that at that time 98% of telephone communications was intrastate. 78 Cong. Rec. 10316 (1934). The FCC states 97% of messages are now intrastate. *Telerent*, Memo Opinion, p. 11. The House Committee was told that every piece of equipment and every exchange could at any moment be used exclusively, although temporarily, in interstate commerce. See statement of K. F. Clardy, House Hearings 73. This condition is the same today.

State regulatory commissions expressed themselves in favor of the Act because they understood it to safeguard the states from usurpation of power by the FCC. See statement of K. F. Clardy, House Hearings 71-72.

As Senator Dill, Chairman of the Senate Committee, pointed out in response to Mr. Clardy's statements, "The reason why the State representatives of the State com-

missions wanted this language [§ 221(b)] in addition to the language of the Interstate Commerce Act—and that has been hopped on, talked about a great deal here, that we have added some language—is that the interpretation placed upon the language of the Interstate Commerce Act in connection with railroads has gone so far that the State commissions fear that this commission, using the same language—that if the same language is used in the law they might override and interfere with State regulations.” Senate Hearings 154.

It was even argued in the Senate Hearings that the bill should be changed to provide for Federal regulation of all facilities used for interstate communication, in order to correspond with the then existing railroad regulation. See Statement of Edward N. Nockels, Legislative Representative of the American Federation of Labor, Senate Hearings 199. Mr. Nockels pointed out that the Act takes away from Federal regulation a large portion of the existing power of the Interstate Commerce Commission. Despite this argument, the wording of the bill remained unchanged, and the taking away of the then existing jurisdiction of the ICC was effected by § 221(b).

In discussing § 221, both the House Report and the Senate Report accompanying S. 3285 state in the same words “Paragraphs (b), (c), and (d) conform to the recommendations of the State commissions, and will enable those commissions, where authorized to do so, to regulate exchange services in metropolitan areas overlapping State lines.” House Report p. 7, Senate Report p. 5.

Senator Dill, Chairman of the Senate Committee on Interstate Commerce, when introducing the bill on the floor of the Senate, pointed out the intent of the bill “to reserve to the State commissions the control of intrastate telephone traffic. *We have kept in mind the fact that the Interstate Commerce Commission, through the Shreveport decision*

*and the decisions in other similar cases, has gone so far in the regulation of railroads that the so-called 'State regulation' amounts to very little. . . . [T]he State commission representatives were jealous, in the preparation of this bill, that those rights should be protected; and we have attempted to do that."* 78 Cong. Rec. 8823 (1934) (Italics added).

Likewise, Representative Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce, when introducing the bill, stated, "Paragraph (b) [of § 221] leaves local exchange service to local regulation even where a portion of such local exchange service constitutes interstate communications." 78 Cong. Rec. 10314 (1934). While it is true both the House and Senate Reports, and both Rep. Rayburn and Sen. Dill indicated that § 221 would take care of the situation where cities are located within two states, the section was incorporated at the request of State commissions, and embodied language which encompassed concerns of the State commissions and of Congress beyond the mere overlapping of telephone exchanges of cities into more than one State. The broad language of § 221(b) bears this out:

"(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

I suggest the legislative history does not indicate that this language should be construed to apply only to cities which overlap state lines, rather the fact that the language was

included at the vigorous request of the State commissions indicates that the section should be read literally and to deny the FCC jurisdiction over intrastate facilities even though incidentally used in interstate commerce. As Representative Rayburn pointed out, this law does "not apply to a telephone receiving set, or anything like that." House Hearings 179.

That the statute should be read literally has been affirmed by the FCC in more recent pronouncements. In 1954, language was added to the statute to include in it "mobile, or point-to-point radio telephone exchange service." The legislative history of this amendment is quite enlightening; See 1954 U.S. Code, Congressional and Administrative News, p. 2133, et seq.

The Senate Report on the bill states in a separate sub-heading styled "PURPOSE," "The purpose of the legislation is to clarify the provisions of the Federal Communications Act with regard to the jurisdiction of the Federal Communications Commission over telephone and telegraph companies which are engaged primarily in intrastate activities and which therefore should be subject to State and local regulation rather than Federal regulation. . . . The legislation is designed to make certain that the use of radio will not subject to Federal regulation companies engaged primarily in intrastate operations." The factual problem which brought about the legislation was the installation of mobile telephones in vehicles, farm houses in rural communities, isolated business developments, seasonal resort areas, etc. While stating that the Justice Department made no recommendation as to whether or not the amendments should be passed, the Deputy Attorney General, in an official communication to the Chairman of the Senate Committee on Interstate and Foreign Commerce, stated, as a construction of the legislation, that "[t]he purpose of the measure is to make certain that the use of radio in the communication service by telephone

and telegraph companies which are engaged primarily in intrastate activities will not subject them to the jurisdiction on the Federal Communications Commission.

Of equal or greater interest and authority is the official comment of the Federal Communications Commission to an official inquiry from the Senate Committee on Interstate and Foreign Commerce found at p. 2135-6 of U.S. Code, Congressional and Administrative News, 1954. Among other comments, the Commission stated ". . . it would be clear that the Commission would not have regulatory jurisdiction over the services in question had they in fact been conducted by wire." p. 2136. This is not only a letter from the Chairman of the Commission;<sup>1</sup> it is the act of the Commission itself construing the statute with which we are immediately involved, and was adopted by the Commission December 18, 1953.

We are faced with the situation, as I see it, that the FCC, from 1934 until 1974, construed the statute in question so that it did not have jurisdiction to regulate attachments to intrastate facilities which were subject to State regulation as provided for under § 221(b) of the statute. Certainly, the great weight given an administrative construction of a statute by its administrator must weigh heavily against the position the FCC now takes. Its change of position, after 40 years of construction of the statute denying its own jurisdiction, furnishes no reason to read the statute other than literally and consistently with the construction

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<sup>1</sup> An official letter from the Chairman of the FCC to the Chairman of the Senate Sub-Committee on the Handicapped, who had inquired whether the FCC required the hearing aid industry to provide equipment for the coupling of hearing aids to telephone instruments was to the same effect as the comment on the 1954 amendment. It stated the Act excluded the FCC from "any authority," and that "such local service matters are subject to the regulatory authority of State commissions in the various States." 119 Cong. Rec. S. 17297, daily ed., Sept. 22, 1973.

given to it by Congress at the time it was enacted and by the agency itself for years thereafter.

I think, then, that the statute, § 221(b), means at the least that Congress provided for State regulation of the services, facilities, etc., as mentioned therein as were at that time subject to State regulation, "even though" in the words of the statute<sup>2</sup> the services or facility might incidentally be used in interstate communication as in an exchange astride a State line.<sup>3</sup>

I submit the intent of Congress was to establish a regulatory scheme for telephone companies, which envisioned a system of *divided jurisdiction*, Federal or State, rather than a system of *primary jurisdiction*, Federal then State, and that the jurisdiction of the State regulatory authorities was intended to be regulated by Congress, not by the whim of the Federal Communications Commission. While the power of Congress to regulate commerce under the Constitution has not been doubted since *Gibbons v. Ogden*, 9 Wheat. 1 (Feb. term 1824), that opinion itself points out that Congress may entirely legitimately manifest "... an intention to leave this subject entirely to the States until Congress should think proper to interpose." p. 208.

No more reason exists for a federal regulatory commission to assert jurisdiction it does not have than exists for a federal court to do so. It should have "... no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given." *Cohens v. Virginia*, 6

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<sup>2</sup> Interestingly enough, see the use of the words "even though" used in a colloquy between F. B. McKinnon, President of the Independent Telephone Association, and the House Committee in the hearings, which corroborates the construction sought by the petitioners here. House Hearings, p. 248. No reason is presented to my satisfaction not to give the words their ordinary meaning.

<sup>3</sup> The facility involved here admittedly has been subject to State regulation.

Wheaton 264, 404 (Feb. term 1821). The FCC here not only, or even principally, usurps the regulatory authority of the States; it usurps the right of Congress to provide for regulatory jurisdiction.

While the opinion of the court may seem to relegate the precise question of the statutory jurisdiction of the FCC to almost an afterthought, I think it is the most important and very nearly the only issue of real consequence in the case. Jurisdiction carries with it the right to regulate revenue—not only the amount, but who gets it, and its source. Depriving the States of jurisdiction deprives them of the right to regulate, which in turn deprives them of the right to distribute the burden of telephone service among the various classes of customers. As a practical matter, this assertion of federal primacy necessarily and directly affects the intrastate rates which may be charged, jurisdiction of which could not be more clearly reserved to the States. The result we arrive at, then, I suggest was never dreamed of by Congress.

Today, we allow the FCC to regulate only a facility mentioned in the statute as reserved for State regulation, but by approving the principle, we establish precedent of affirming FCC regulation of those matters mentioned in § 211(b) as reserved to the States. No reason would then exist for the FCC not to regulate “charges, classifications, practices, [and] services,” other matters specifically reserved for State regulation by the same statute, and it must now be taken as the law that any continued State regulation of “charges, classifications, practices, [and] services” is by grace of the Federal Communications Commission, not by act of Congress, for we have approved the principle of FCC assertions of primary jurisdiction.

While there may be no doubt that Congress had the power to grant the FCC jurisdiction over intrastate facilities that are used incidentally in interstate commerce,

such as the inter-connection of customer provided equipment involved here, as I read the statute and legislative history, Congress specifically declined so to do in the face of some who argued that it should.<sup>4</sup> As Congress did not confer jurisdiction on the Federal Communications Commission, it is not for us to consider whether it should have then, or whether it should now. I think it has not, and any change in the jurisdictional regulatory scheme is a matter for Congress and not for the courts.

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<sup>4</sup> While the opinion of the court relies in part on the creation and existence of the federal-state joint board, a recent decision of the FCC illustrates the utter futility of relying on the FCC to heed the advice of the joint board which had attempted to protect the telephone companies from detrimental economic effect through revenue losses directly brought about by FCC assertion of jurisdiction over attachments to telephone systems. *In the Matter of Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Services (MTS) and Wide Area Telephone Service (WATS)*, FCC Docket 19528 (March 18, 1976).

## **APPENDIX B**



**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

**Docket No. 19808**

**In the Matter of**

**TELERENT LEASING CORP. ET AL.**

**Petition for Declaratory Rulings on Questions of Federal  
Preemption on Regulation of Interconnection of Sub-  
scriber-Furnished Equipment to the Nationwide  
Switched Public Telephone Network**

**Memorandum Opinion and Order**

**(Adopted January 31, 1974; Released February 5, 1974)**

**BY THE COMMISSION:**

1. By Memorandum Opinion and Order released on September 7, 1973 (FCC 73-901) we instituted this proceeding, pursuant to Sections 4(i), 4(j), and 403 of the Communications Act and Sections 1.1 and 1.2 of our Rules, to afford interested persons an opportunity to submit briefs and oral argument on the question of whether and to what extent the actions taken by the Commission on interconnection of customer-provided communications equipment to the nationwide switched public telephone network have preempted state action in this area. Our action was prompted by a petition for declaratory rulings filed on August 8, 1973 by North American Telephone Association (NATA), a trade association, and a number of its members in North Carolina and Nebraska, engaged in the manufacture, distribution, leasing, sale, installation and maintenance of communications terminal equipment and systems for connection with the switched telephone network. That petition,

in turn, was occasioned by recent actions of the States of North Carolina and Nebraska.

2. On June 29, 1973 the North Carolina Utilities Commission gave notice of a proposed rule (R9-5) which would generally prohibit interconnection of customer-owned or customer-provided equipment to the communications system of any telephone company doing business in North Carolina. Under the proposed rule, any such telephone company could provide such interconnection for interstate services only over facilities distinct and separate from those used for intrastate services. By letter dated July 18, 1973 to the Nebraska Public Service Commission, the Attorney General of Nebraska rendered an advisory opinion that our *Carterfone* decision (13 FCC 2d 420; reconsideration denied, 14 FCC 2d 571 (1968)) did not prevent a telephone company from prohibiting interconnection of customer-provided equipment for intrastate use. He also advised, in effect, that a hotel or motel could not interconnect privately-owned communications equipment with a telephone company without certification as a common carrier by the Public Service Commission upon a finding that the telephone company in the area had refused or failed to provide adequate service.

3. In our Order of September 7 herein, we stated our opinion that "the above described advisory opinion of the Attorney General of the State of Nebraska and Rule R9-5 proposed by the North Carolina Utilities Commission have created uncertainty concerning whether and, if so, to what extent actions we have taken, and policies we have promulgated, in *Carterfone* and related cases with respect to interconnection of customer-provided communications equipment to the nationwide switched public telephone network have pre-empted State action in this area." Such actions and policies may be summarized briefly as follows:

## CARTERPHONE AND RELATED CASES

4. Our *Carterfone* decision (13 FCC 2d 420) involved a device used to interconnect mobile radio systems to the interstate and foreign message toll telephone system. We found that the Carterfone device filled a need, that its use did not adversely affect the telephone system, and that its use was nevertheless prohibited by provisions in an American Telephone and Telegraph Company (AT&T) tariff for interstate service. We held that the AT&T tariff was unreasonable and unlawful within the meaning of Section 201(b) of the Communications Act in that it prohibited the use of interconnecting devices which do not adversely affect the telephone system. In so holding we relied on *Hush-A-Phone Corp. v. U.S.*, 99 U.S. App. D.C. 190, 193, 238 F. 2d 266, 269 (D.C. Cir. 1956), holding that an AT&T tariff prohibition of a customer-supplied "foreign attachment" was an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." See also *Hush-A-Phone Corp. et al. v. AT&T*, 22 FCC 112 (1957). In *Carterfone* we did not prescribe the terms of a new tariff, but left that to the initiative of the telephone companies, pointing out that they were in no wise precluded from adopting reasonable standards to prevent harmful interconnection. In denying reconsideration, we recognize that the economic effects of interconnection upon the carriers' rate structure might well be a pertinent public interest question, but found no substantial showing in the record to demonstrate economic harm (14 FCC 2d 571, 572-573).

5. As a result of our *Carterfone* decision, AT&T filed new and revised tariffs, presently in effect, which permit the interconnection and use of customer-provided terminal devices or communications systems to the telephone message toll and exchange network subject to certain conditions. One such condition is that any network control signalling

unit (NCSU) must be furnished, installed and maintained by the telephone company (except for certain military installations and remote or hazardous locations). In our decision permitting such tariffs to go into effect without formal investigation or hearing, we held that the tariff bar against any customer providing his own NCSU in connection with telephone company facilities was not in conflict with our *Carterfone* ruling, which dealt with interconnections and not replacements of any part of the telephone system. *AT&T "Foreign Attachment" Tariff Revisions*, 15 FCC 2d 605, 609-610 (1968) reconsideration denied, 18 FCC 2d 871, 872 (1969). Similarly, we have held that the present restrictions in the interstate tariffs for message toll telephone service (MTS) and wide area telephone service (WATS) against customers providing interconnection arrangements (CA's) for direct connection of customer-provided equipment (e.g., electrocardiograph, telephotograph and recording devices) to the telephone system also did not violate our *Carterfone* decision. See *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539, 542.

6. In our decision permitting the AT&T tariff to go into effect, we instituted informal proceedings to obtain technical and operational data to assist our evaluation of the public interest factors involved in possible liberalizing revisions of NCSU and CA provisions of the tariffs for MTS and WATS (15 FCC 2d at 610-611, 18 FCC 2d at 872). We also contracted with the National Academy of Sciences (NAS) and Dittberner Associates to conduct technical studies on the question of whether such revisions are technically feasible in view of our concern that the telephone network be protected from harm. The reports submitted to us by NAS and Dittberner, and numerous comments from interested persons, indicated that consideration should be given to revisions in MTS and WATS offerings under a standards and enforcement program that would protect the telephone network from three types of harm:

(a) protection from excessive voltage and signal levels, (b) improper network signalling and (c) line imbalance. Accordingly, we created two advisory committees, pursuant to Executive Order 11007, to study the possibilities of initiating such a standards program for certain selected classes of equipment, namely, customer-provided PBX's, automatic dialers and recording and answering devices. *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539, 540 (1972).

7. On June 14, 1972 we instituted a formal proceeding (Docket No. 19528) to determine whether and with what terms, conditions or limitations the interstate MTS and WATS tariffs should be revised or the Commission should adopt rules to permit customers for switched telephone network services to have the option of providing their own NCSU and CA in lieu of those now provided by the telephone companies. We convened a Federal-State Joint Board pursuant to Section 410(c) of the Communications Act to submit recommendations to us in this matter, stating (*Interstate and Foreign MTS and WATS*, 35 FCC 2d at 541):

We believe that special procedures are required for the reason that any action that we might take herein to provide the optional MTS or WATS services as heretofore described would appear to require, as a practical matter, that complementary changes be made in the offerings of local telephone exchange and intrastate toll services. For example, if this Commission should decide that, insofar as interstate or foreign MTS and WATS are concerned, the telephone companies should allow customers the option of providing their own network control signalling units for those provided by the telephone companies, implementation of such a decision would require, as a practical matter, that the same options are also available in connection with local exchange and intrastate MTS and WATS.

This is because almost all such units are used in common for both interstate and local and intrastate communications. Accordingly, we believe that we should not undertake the final resolution of the issues herein without the closest coordination and cooperation between this Commission and state regulatory agencies which have regulatory responsibility for local and intrastate communications services. Therefore, we shall refer these proceedings to a Federal-State Joint Board pursuant to Section 410(c) of the Act.

8. We also made clear that the Joint Board proceeding does not look toward any modification of our *Carterfone* holding, but rather is to determine whether there is a public need to go beyond what we ordered in *Carterfone*, stating (35 FCC 2d at 542):

We believe that the soundness of our *Carterfone* decision has been amply demonstrated. New markets have been opened to the innovative enterprise of many companies; the public has benefitted from having a wide range of choices available when the individual user selects the terminal device or private system which will best serve his particular communications need; and there has been no actual demonstrable harm to the telephone system or its users. Accordingly, this proceeding will not be concerned with any question relating to whether or not modifications should be made in that decision or in any of the provisions in the interstate MTS and WATS tariff provisions filed in compliance therewith. Our proceeding herein is concerned with the pending and unresolved basic issues now before us as to whether, and to what extent, there is a public need to go beyond what we ordered in *Carterfone* and permit customers to provide, in whole or in part, the aforementioned NCSU's and CA's in interstate MTS and WATS and, if so, what terms and con-

ditions should apply to protect the telephone system and services of others.

#### POSITIONS OF THE PARTIES

9. Pursuant to our Order of September 7, 1973 herein, interested persons filed comments on October 1 and reply comments on October 23, 1973. Oral argument before the Commission *en banc* was held on October 30, 1973.<sup>1</sup> The positions of various parties may be summarized briefly as follows:

#### PETITIONERS NATA ET AL. AND THOSE SUPPORTING THEIR POSITION

10. Petitioners NATA *et al.* claim that the North Carolina proposed Rule R9-5 and the Nebraska advisory ruling (*supra*, paragraph 2), are in conflict with *Carterfone* and present a threat to the federally declared right of telephone users to provide their own interstate interconnection devices. Because there is no interstate message toll service offered except over equipment used for both interstate and intrastate service, a state prohibition against interconnection would require carriers providing interstate service in the state to take action contrary to existing interstate tariffs, in violation of the Communications Act and federal law. Moreover, the lack of separate intrastate and interstate telephone facilities dictates that Commission regulation in this area must be exclusive in order to ensure uniform treatment of all customers nationwide. A Commission ruling now on the basic issue of jurisdiction is appropriate and desirable to remove the uncertainty created by the North Carolina and Nebraska actions—an uncertainty which questions the integrity of *Carterfone* and the pending Federal-State Joint Board proceeding (Docket No.

<sup>1</sup> The "Motion to Correct Transcript of Oral Argument", filed by the National Association of Regulatory Utility Commissioners, is hereby granted, as well as that filed by Southern Pacific.

19528) and which has caused a decline in the market for interconnect equipment in North Carolina and Nebraska. Petitioners request the Commission to reaffirm *Carterfone* and the right of users to interconnect communications equipment and systems in accordance with applicable interstate tariffs, to declare federal superintendence in the area of interstate interconnection, and to make more explicit its preemption of such interconnection matters from inconsistent and burdensome state regulations and actions.

11. The views of the petitioners are supported by other manufacturers of interconnect equipment,<sup>1a</sup> users of customer-provided terminal equipment and their representatives,<sup>2</sup> various specialized common carriers,<sup>3</sup> and the Department of Justice. They urge that the Commission has comprehensive jurisdiction over interstate and foreign communications under Sections 1, 2(a), 3(a) and (b), 201-205, and 410(c) of the Communications Act,<sup>4</sup> including

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<sup>1a</sup> E.g., Computer and Business Equipment Manufacturers Association; General Electric Company; Electronic Industries Association; Ericsson Centrum, Inc.; Phone-Mate, Inc.; International Business Machines Corp.; Independent Data Communications Manufacturing Association; International Telephone and Telegraph Corp.

<sup>2</sup> E.g., Aeronautical Radio, Inc. and Air Transport Association of America; American Petroleum Institute; Computer Timesharing Services Section; Utilities Telecommunications Council; Association of American Railroads; National Retail Merchants Association, Inc.

<sup>3</sup> E.g., Microwave Communications, Inc. and MCI Telecommunications Corp.; Data Transmission Company; Southern Pacific Communications Company; N-Triple-C, Inc.

<sup>4</sup> In support of the Commission's comprehensive authority over interstate communications, Justice and other parties cite:

*General Telephone Co. of California v. FCC*, 413 F. 2d 390, 398 D.C. Cir. (1969), *cert. den.* 396 U.S. 888; *United States v. Midwest Video Corp.*, 406 U.S. 649, 659-70 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Gen-*

jurisdiction to regulate interconnection of customer-provided equipment with common carrier facilities capable of interstate service even though the facilities are used also for intrastate service.\* The Commission's decision in *Carterfone* and the interstate tariffs filed pursuant thereto establish the existence of a definitive and positive federal policy on interconnection which preempts this area from conflicting state regulation.\* Indeed, Congress recently rec-

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*eral Telephone Co. of Southwest v. United States*, 449 F. 2d 846, 853-55 (5th Cir. 1971); *Ivy Broadcasting Co. v. AT&T*, 391 F. 2d 486 (2d Cir. 1968); *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D. N.Y. 1944), affirmed *sub nom Hotel Astor Inc. v. U.S.*, 325 U.S. 837 (1945); *Ambassador, Inc. v. United States*, 325 U.S. 317, 323 (1945).

\* In support of FCC jurisdiction over equipment used for interstate communication, even though also used for intrastate, parties cite:

*AT&T—Railroad Interconnections*, 32 FCC 337, 339 (1962); *Fallon Travelodge v. Churchill County Telephone and Telegraph System*, 14 FCC 2d 972 (1968); *Use of Recording Devices*, 11 FCC 1033, 1047 (1947); *Jordaphone Corp. of America v. AT&T*, 18 FCC 644 (1954); *Hush-A-Phone Corp. v. AT&T*, FCC 55-1242 (1955) 22 FCC 112, 113 (1957); *U.S. Department of Defense v. General Telephone Co.*, 38 FCC 2d 803, 807-814 (1973), aff'd FCC 73-854; *AT&T—TWX*, 38 FCC 1127, 1133 (1965); *Katz v. AT&T*, 8 RR 919 (1953); *Colorado v. United States*, 271 U.S. 153 (1926); *GTE Service Corp. v. FCC*, 474 F. 2d 724, 736 (2d Cir., 1973); *Chastain v. AT&T*, FCC 73-791 (1973).

\* For the proposition that the FCC's exercise of jurisdiction preempts conflicting or inconsistent state regulation, the parties cite, *inter alia*:

*Houston, East/West & Texas Ry. v. United States*, 234 U.S. 342 (1914)—the "Shreveport Rate Cases"; *Southern Ry. Co. v. Reid*, 222 U.S. 424 (1912); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Head v. New Mexico Board*, 374 U.S. 424, 430 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *United States v. New York Central R.R.*, 272 U.S. 457,

ognized the Commission's inherent pre-emptive authority over interstate/intrastate facilities when it amended section 410 of the Act to require that a Federal-State Joint Board be consulted in separation matters and to permit a Joint Board to consider other common carrier matters of joint interest. The Senate Report on this amendment, noting that common plant facilities are used for interstate and intrastate telephone calls, stated that in assigning the cost of this plant for rate making purposes "the Federal Government preempts the States in the area of Federal jurisdiction." (S. Rept. No. 92-303, 92 Cong., 1st Sess. 1971.) The Department of Justice asks the Commission to make clear that all carriers are and will remain subject to all FCC rulings and tariffs pertaining to interconnection regardless of any purported state rulings to the contrary and would be liable under federal law for failure to abide by FCC rulings and tariffs.

#### STATE REGULATORY INTERESTS

12. The North Carolina Utilities Commission (NCUC) urges that Sections 2(b) and 221(b) of the Communications Act reserve to the states the right to regulate intrastate telephone exchange service even where a portion of such service consists of interstate or foreign communication. The rulemaking proceeding presently pending before the NCUC involves an investigation into the effect of sub-

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463-464 (1926); *Farmers Educ. & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525, 531-35 (1959); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 130-32 (1945); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Rice v. Chicago Bd. of Trade*, 311 U.S. 247, 253-254 (1947); *Northern States Power Co. v. Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148-149 (1930); *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954); *Carter v. AT&T*, 250 F. Supp. 188 (D.C. Tex. 1966); *FPC v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 19 (1961); *FPC v. Louisiana Power and Light Co. et al.*, 406 U.S. 621 (1972).

scriber-provided equipment upon intrastate service and its economic effect upon the telephone using and consuming public. The NCUC has not reached any decision with regard to interconnection; publication of the proposed rule was only to establish the scope of the proceeding. There is no actual controversy yet, and it would be premature and beyond the Commission's statutory authority under the Administrative Procedure Act (5 U.S.C. 554(e)) to issue a declaratory order. Further, the Federal Communications Commission is not an appropriate forum to determine conflicts between a state and federal statute.<sup>7</sup> Moreover, since the regulation of interconnect equipment falls within the categories of communications that Congress excluded from federal control under Section 2(b) of the Communications Act, the FCC cannot claim preemption of the field through its statutory grant of authority. *Carterfone* did not open the door to indiscriminate installation of interconnect equipment and does not foreclose state action on interconnect equipment where it is shown to have an adverse effect on the telephone network.

13. Similar views were expressed by the National Association of Regulatory Utility Commissioners (NARUC) and various State commissions.<sup>8</sup> They urge that the actions complained of by petitioners relate solely to intrastate telephone communications services, and therefore are beyond the jurisdiction delegated to the FCC by the Communications Act.<sup>9</sup> In claiming that Congress vested in the

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<sup>7</sup> NCUC cites: *Arkansas Power & Light Co. v. FPC*, 156 F. 2d 821, 833 (D.C. Cir. 1946); *Harvey Aluminum, Inc. v. NLRB*, 335 F. 2d 749, 754 (1964).

<sup>8</sup> E.g., Missouri Public Service Commission, Georgia Public Service Commission, Public Utilities Commission of Ohio, Maryland Public Service Commission, Michigan Public Service Commission, Oregon Public Utility Commissioner, Washington Utilities and Transportation Commission, Public Service Commission of Wyoming, Alabama Public Service Commission, Tennessee Public Service Commission.

<sup>9</sup> They cite: *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769

State Commissions exclusive jurisdiction over intrastate telephone service, including interconnection with respect to intrastate telephone communication, they rely on Sections 2(b) and 221(b) of the Communications Act and the legislative history. See S. Rep. No. 781, 73rd Cong., 2d Sess., p. 3 (1934) noting that the Act "reserves to the States exclusive jurisdiction over intrastate telephone and telegraph communication"; and remarks of Senator Dill, especially at 78 Cong. Rec. 8823 (1934), stating:

Now, taking up the bill, title I, containing the general provisions of the bill, creates a commission for the regulation of all radio and telephone and telegraph communications. We have attempted in title I to reserve to the State commissions the control of intrastate telephone traffic. We have kept in mind the fact that the Interstate Commerce Commission, through the Shreveport decision and the decisions in other similar cases, has gone so far in the regulation of railroads that the so-called "State Regulation" amounts to very little.

We have attempted, in this proposed legislation, to safeguard State regulation by certain provisions to the effect that where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply.

NARUC further asserts that the petition is an impermissible collateral attack on State administrative processes and should be dismissed.<sup>10</sup> And, finally NARUC takes the

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(1945); *Parker v. Brown*, 317 U.S. 341, 359-360 (1943); *Rice v. Board of Trade of City of Chicago*, 331 U.S. 247, 254 (1947); *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 517-519 (1947).

<sup>10</sup> Citing *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 243, 245-247 (1952); *Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F. 2d 237 (3rd Cir. 1972), cert. den. .... U.S. .... 35 L. Ed. 2d 609 (1973); *Public Utilities*

position that the relief requested by petitioners cannot be granted in a summary proceeding and should be considered by the Federal-State Joint Board in Docket No. 19528. NARUC states that "it cannot be doubted that the widespread commonality of use of terminal equipment and systems for both interstate and intrastate communications makes Federal-State cooperation on interconnection matters more appropriate than Federal-State confrontation."

14. Two States take a somewhat different position. The Public Service Commission of the State of New York states that a limited declaratory ruling may be warranted on the basis of the facts alleged in this proceeding to avoid potential conflicts based on the common use of inter- and intrastate facilities by customer-owned attachments. However, in issuing such a ruling the Commission should recognize that the jurisdiction of the several States over intrastate communications encompasses a regulatory responsibility for customer-owned equipment and that it would be inconsistent with the public interest to preempt the role of the several States in this area. The Public Service Commission of the State of California urges that the FCC has not yet acted to pre-empt State action on interconnection and should not do so now. If the States are left free to develop their policies individually until such time as a comprehensive interconnection program is instituted, a State commission may develop a more reasonable, practical and workable interconnection program as compared to those requirements presently in the interstate tariffs. The California Commission has recently initiated a proceeding to develop regulations designed to provide for independent testing and certification of equipment for interconnection with the telephone network, and should be free to proceed until a comprehensive federal program is instituted.

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*of the State of California v. United Air Lines, Inc.*, 346 U.S. 402 (1953); *Alabama Public Service Commission v. Southern Railway Company*, 341 U.S. 341 (1951).

## TELEPHONE COMPANIES

15. Bell System Companies (AT&T), various independent telephone companies,<sup>12</sup> and the United States Independent Telephone Association express views similar to those of NCUC and NARUC on the question of jurisdiction. They urge that Congress has specifically reserved to the States the exclusive authority to regulate intrastate and telephone exchange communication services,<sup>13</sup> and has conferred on this Commission something less than the full authority it was within the powers of Congress to grant.<sup>14</sup> AT&T further asserts that the past practice of the States in regulating telephone companies in general and interconnection in particular, as well as the local nature of the connections in question (since about 97 percent of telephone messages are intrastate), bar federal pre-emption.<sup>15</sup> The Commission's

<sup>12</sup> GTE Service Corporation on behalf of its affiliated telephone companies; United Telecommunications, Inc. on behalf of Carolina Telephone and Telegraph Company and United Telephone Company of the Carolinas, Inc.; and Continental Telephone Corporation.

<sup>13</sup> In addition to relying on Sections 2(b) and 221(b) of the Communications Act and the legislative history cited by NARUC, AT&T refers to: H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934); 78 Cong. Rec. 10314 and 10316 (1934); Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 135-136 (1934); Hearings on S. 2910 Before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 8, 153 (1934); H.R. Rep. No. 910, 83d Cong., 1st Sess. 1 (1953); Statement of the Senate Committee on Interstate and Foreign Commerce, S. Rep. No. 1090, 83d Cong., 2d Sess. 1-2 (1954).

<sup>14</sup> By way of support AT&T cites: *Sterling Manhattan Cable Television, Inc. v. New York Tel. Co.*, 38 FCC 2d 1149, 1156 (1973); *Doniphan Tel. Co. v. AT&T et al.*, 34 FCC 950, aff'd 34 FCC 949 (1963); *Southwestern Bell Tel. Co. v. United States*, 45 F. Supp. 403, 406 (W.D. No. 1942); *Kitchen v. FCC*, 464 F. 2d 801 (D.C. Cir. 1972).

<sup>15</sup> AT&T cites principally: *Head v. New Mexico Board*, 374 U.S. 424 (1963); *Rice v. Chicago Board of Trade*, 331 U.S. 247 (1947);

decisions in *Carterfone* and related cases have not pre-empted State action in this area, regardless of what was meant by the Commission, and the Commission should now defer to the judgment of the State regulatory agencies. Indeed, in *Jordaphone*, 18 FCC 644, 670-671 (1954), the Commission exercised its asserted jurisdiction in a way to support, not supplant, State jurisdiction. Moreover, it would not be appropriate for the Commission to issue a declaratory ruling since the North Carolina Rule R9-5 is only a proposed rule, and the advisory opinion of the Nebraska Attorney General is not a definitive determination of State law.<sup>16</sup>

#### REPLY COMMENTS

16 The reply comments of the parties largely reiterate and expand on the views set forth in the comments. A few new points warrant brief mention.

17. The Department of Justice and others note that NARUC and AT&T, in quoting from Senator Dill's re-

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*FTC v. Bunte Bros.*, 312 U.S. 349 (1941); *Palmer v. Massachusetts*, 308 U.S. 79 (1939); *Southwestern Bell*, *supra*, 45 F. Supp. at 406; *California v. Zook*, 336 U.S. 725 (1949); *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261 (1943); *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951); *Maurer v. Hamilton*, 309 U.S. 598 (1940).

<sup>16</sup> In arguing that the FCC has not pre-empted the field, other telephone company interests rely on the following in addition to cases cited by AT&T: *Panhandle Pipe Line Co. v. Comm.*, 332 U.S. 507, 513 (1947); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440; *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963); *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959); *TV Pix v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970); *Chrysler Corp. v. Tofany*, 419 F. 2d 499 (2d Cir. 1969); *Swift & Co. v. Wickham*, 364 F. 2d 241 (2d Cir. 1966), *cert. den.* 385 U.S. 1036; *Colorado Anti-Discrimination Comm. v. Continental Airlines*, 372 U.S. 714, 724 (1963); *Parker v. Brown*, 317 U.S. 343, 353 (1943).

marks on *Shreveport* during the debate on the 1934 Act, did not set forth the next two sentences of Senator Dill, as follows (78 Cong. Rec. 8823 (May 15, 1934)):

We have in mind, for instance, cases where a city has telephone service connecting into a number of States, such as we have right here in Washington, running out into Maryland and out into Virginia, and in New York the service runs into New Jersey, and I think perhaps into Connecticut, though I am not sure about that. There are many cases in the country where, without some saving clause of that kind, the State Commissions might be deprived of their power to regulate; and the State commission representatives were jealous, the preparation of this bill, that those rights should be protected; and we have attempted to do that.

They maintain that Senator Dill was concerned with the preservation of traditional state jurisdiction over local rates and service, not with the provision of equipment to be used in conjunction with both intrastate and interstate service. Moreover, the legislative history demonstrates that, whatever else Congress may have intended to preserve in the way of state jurisdiction, Congress specifically placed upon local telephone companies the duty of complying with Sections 201-205 of the communications Act—the sections pursuant to which the *Hush-A-Phone* and *Carterfone* decisions were rendered.<sup>17</sup> The legislative history also evidences a concern with effective national regulation.<sup>18</sup>

18. The Department of Justice appends statements by representatives of the General Services Administration

<sup>17</sup> Citing: H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10313 (1934) (Remarks of Cong. Rayburn); 78 Cong. Rec. 8846-7 (1934).

<sup>18</sup> Citing, S. Rep. No. 781, 73rd Cong., 2d Sess. 2 (1934); H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 3 (1934); 78 Cong. Rec. 10316-17 (1934).

and the Federal Aviation Administration, which describe how any prohibition against interconnection of customer-provided equipment would impede present and projected communications programs of the U.S. Government. NATA, CBEMA, and others urge that there is no prematurity precluding a Commission declaratory ruling to remove an uncertainty that presently threatens the affected industries, the public's use of interstate communications facilities, the fundamental integrity of the Commission's processes, and the ability of the Commission to discharge its statutory responsibilities in the future. It is further asserted that the power Congress conferred upon the Commission to regulate the use of telephone equipment employed in the provision of interstate communication is not restricted by Sections 2(b) and 221(b), and that the breadth of the *Shreveport* doctrine is unnecessary to sustain FCC jurisdiction over customer-supplied equipment used for interstate purposes.<sup>19</sup>

19. NCUC asserts that *Carterfone* has no effect on the North Carolina proposed rulemaking procedure because it deals only with attachments to the existing system, whereas North Carolina's main concern is with replacements or substitutions of utility company furnished equipment. Moreover, *Carterfone* only requires that adverse effect to the system be established in order to prohibit interconnect devices and no action prohibiting customer-provided equipment would be taken by NCUC unless adverse effect was established by the evidence. Further NCUC contends it is not proposing the creation of two separate systems for intrastate and interstate telephone service—which is not feasible or desirable. By the reference in proposed Rule R9-5 that interstate service was exempt, NCUC was primarily making a jurisdictional declaration. However, there are some totally interstate facilities (e.g., CATV lines, TV and

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<sup>19</sup> *Common Carrier Tariffs for CATV Systems*, 4 FCC 2d 257, 260 (1966).

radio circuits, dedicated private lines, signaling lines) which NCUC has no interest in reaching.

20. NARUC, AT&T and others assert that the *Shreveport* line of cases cited by proponents of the petition has no applicability to the instant situation in view of the legislative history of Section 2(b) and the deliberate refusal of Congress to grant the FCC pre-emptive powers of the type sanctioned by *Shreveport*. They further urge that Section 410(c) was designed to make the Federal-State Board procedure particable and did not in any way substantively limit the States' authority under pre-existing law. AT&T asserts that in most Commission decisions relied on by the proponents of pre-emption, the Commission limited its determination to interstate and foreign service and avoided any claim of general power to pre-empt State regulation of intrastate communications.<sup>20</sup>

#### DISCUSSION AND CONCLUSIONS

21. Before addressing the specific legal and jurisdictional issues involved in this proceeding, we first take note of the questions raised as to the appropriateness of a declaratory ruling by the Commission designed to clarify the jurisdictional scope and effect of our *Carterfone* ruling and the tariffs filed in implementation thereof. In this regard, we are not obliged to, nor do we deem it appropriate to, await some definitive action by a State or a carrier which creates a conflict between Federal and State regulation having the ingredients of a conventional "case or controversy" before issuing such a ruling. As an administrative agency, we are vested by statute with broad and discretionary powers to devise and use procedures, such as the issuance of declara-

<sup>20</sup> Citing, e.g.: *Use of Recording Devices*, 11 FCC 1033, 1037, 1054 (1947); *Jordaphone Corp.*, 18 FCC 644, 670-671 (1954); *AT&T-TWX*, 38 FCC 1127, 1132-34 (1965); *DOD v. General Telephone Co.*, 38 FCC 2d 803, 813-814 (Review Board 1973), *review den.*, FCC 73-854 (Aug. 8, 1973).

tory judgments, as may be reasonably appropriate to discharge our statutory responsibilities with respect to effective regulation of interstate and foreign communication, including the clarification of the scope and effect of rulings issued by us in the performance of those responsibilities. (See *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-43 (1940); Section 4(j) of the Communications Act; *NBC v. U.S.*, 319 U.S. 190, 219 (1943); *GTE Service Corp. v. F.C.C.*, 474 F. 2d 724 (C.A. 2, 1973); *Philadelphia Television Broadcasting Co. v. F.C.C.*, 258 F. 2d 282 (C.A.D.C. 1964)).

22. We believe that it is particularly appropriate in the instant case to take action by way of a declaratory judgment in order to remove or alleviate the uncertainty and confusion that has been created with respect to the application and effects of our *Carterfone* ruling by the NCUC proposed Rule R9-5 and the advisory opinion of the Attorney General of Nebraska. We believe that it would be contrary to the public interest to await the formal adoption and implementation of those State actions before dealing with the conflicts and confusion that such threatened actions have already generated. The course being pursued by NCUC and the Attorney General of Nebraska, and possibly by other States,<sup>\*\*\*</sup> is a source of great controversy and confusion for manufacturers and users of customer-provided, communications equipment and also casts doubt on the continuing efficacy, application and effects of *Carterfone* and the effective tariffs on file with this Commission in implementation of *Carterfone*. We would be remiss in the discharge of our broad statutory responsibilities to remain passive in the face of the policy and regulatory confusion which permeates the entire field of interconnection as a result of these State actions.

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<sup>\*\*\*</sup> We discuss in paragraphs 54-56 the recent actions by the Oklahoma Corporation Commission.

23. Concerning the recommendation that these matters be referred to the Federal-State Joint Board that we have created pursuant to Section 410 of the Communications Act, we do not believe the Joint Board to be an appropriate forum for the resolution of the jurisdictional issue raised by the North Carolina and Nebraska actions. The Joint Board is an appropriate vehicle for the consideration of technical and economic aspects of the interconnection policies and tariffs. It is not a proper or appropriate vehicle for determining the statutory jurisdiction of this Commission and the legal effects of policies promulgated by us in furtherance of our statutory responsibilities.

24. We turn now to the merits of the questions concerning the extent to which our *Carterfone* ruling and the implementing interstate tariffs have preempted and foreclosed conflicting or inconsistent actions by the States or the carriers in the interconnect area.

25. Those parties who argue that *Carterfone* has preemptive effect upon State action rely, in essence, upon those provisions of the Communications Act which give the Commission comprehensive and pervasive powers and responsibilities with respect to the regulation of interstate and foreign communication and common carriers engaged in the furnishing of such communication. Those parties who argue that the *Carterfone* ruling has no preemptive effects rely upon certain provisions of the Communications Act, notably Sections 2(b) and 221(b), which place certain limitations upon the Commission's jurisdiction. A realistic evaluation of the merits of these arguments, in light of the statutory scheme of the Communications Act, requires at the outset that we take account of the nature of the telephone system and telephone service to which such statutory scheme of regulation applies.

26. It is undisputed that we are dealing with a nationwide network of interconnected telephone exchanges. These

exchanges provide the single means by which telephone subscribers have access to the telephone system for making or receiving local telephone calls within an exchange area, intrastate calls to or from subscribers served by other exchanges in the same state, and interstate or foreign calls to or from subscribers served by exchanges in other states or foreign countries. In other words, exchange plant, particularly subscriber stations and lines, is used in common and indivisibly for all local and long distance telephone calls. There is no interstate message toll telephone service either offered or practically possible except over exchange plant used for both intrastate and interstate and foreign service.

27. That the Commission has plenary and comprehensive regulatory jurisdiction over interstate and foreign communications services and facilities of common carriers and all of the terms and conditions upon which such services and facilities are offered to the public is evident from the provisions of the Communications Act. It appears equally evident from those provisions that in those instances where the rendition of interstate and foreign service is dependent upon plant facilities which are also used for exchange or other intrastate services, the Federal role must be controlling. These conclusions follow from a consideration of the express purposes sought to be achieved by the Congress and the specifics of the statutory scheme formulated by the Congress to accomplish those purposes.

28. Congressional purposes are clearly indicated in the first paragraph of the Communications Act of 1934 wherein it is stated that the Commission was created for "the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." (Section 1). The intent is further stated

in the next section which provides that the Communication Act shall "apply to all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communications . . ." (Section 2(a)). In the third section it is made clear that the Commission's authority over interstate communication by wire or radio covers not only the "transmission" of messages but also "all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission" (Section 3(a) and (b)). Sections 201 and 202 outlaw unjust, unreasonable and discriminatory practices by any common carrier in connection with its furnishing of interstate and foreign communication. The Act also requires the common carrier to file with this Commission "schedules showing all charges for itself and its connecting carriers for interstate or foreign wire or radio communication . . . and showing the classifications, practices, and regulations affecting such charges" (Section 203(a)). No carrier "shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act . . . and no carrier shall . . . extend to any person any privilege or facilities, in such communication, . . . except as specified in such schedule" (Section 203(e)). The Commission is empowered to conduct hearings concerning the lawfulness of any new or existing charge, classification, regulation or practice of a common carrier (Section 204) and to prescribe just and reasonable ones (Section 205). For purposes of these Sections of the Act (Sections 201-205), Congress explicitly granted this Commission jurisdiction over all common carriers engaged in interstate or foreign communications, including "connecting carriers" who are exempt from certain provisions of the Act other than Sections 201 through 205<sup>21</sup> and 301.

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<sup>21</sup> "Connecting carriers" engage in interstate and foreign service only through physical connection of their facilities with the facilities of other carriers with which they have no direction or indirect

29. Other provisions of the Communications Act vest the Commission with a wide range of powers to facilitate implementation of the substantive requirements and proscriptions of Sections 201 to 205. What is particularly noteworthy here is that in apparent recognition of the indivisible character of carrier plant and operations these other provisions make no distinction in terms of their application between the intrastate and interstate services, operations and activities of a carrier. Thus, Section 219 empowers the Commission to prescribe the form and content of the annual and monthly reports to be filed by carriers with respect to all aspects of their business and operations. Section 220 empowers the Commission to prescribe the form of any and all accounts and records to be kept by the carriers, as well as the depreciation charges to be entered by the carriers in their accounts. Sections 221(c) and (d) of the Act give the Commission authority to classify the property of carriers and to determine what property shall be considered as used in interstate and foreign toll service. After making such classification, the Commission may in its discretion value only that part of the property of the carrier determined to be used in interstate and foreign telephone toll service. Here again, the Act makes clear the primacy of Federal jurisdiction with respect to property clearly used to provide interstate and intrastate services and facilities. Finally, in keeping with the all-embracing scheme of the Communications Act that the Commission should regulate interstate and foreign communication "so as to make available a rapid, efficient Nationwide, and world-wide wire and

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corporate or other affiliations. Connecting carriers are nevertheless expressly subject to the substantive requirements of Sections 201 through 205 of the Act, except they are relieved of the tariff filing requirements of Section 203. However, their participation in interstate and foreign services is governed by the same terms and conditions of the tariff schedules filed with the Commission by the carriers with which they connect. (See Sections 3(u) and 2(b) of the Act).

radio communication service with adequate facilities at reasonable charges . . ." (Section 1), the provisions of Section 218 direct the Commission to keep itself informed as to the manner and method in which the business and management of the carriers are conducted and as to technical developments and improvements in wire and radio communication to the end that the benefits of new inventions and developments may be made available to the people of the United States.

30. Acting within the general context of the provisions of the Communications Act and Section 201(b) in particular, the Commission in *Carterfone* declared unlawful the prohibition in AT&T's interstate tariffs against the use of all customer-owned equipment and ordered AT&T to file appropriate revisions to its interstate tariffs which would remove this "unwarranted interference with the telephone subscriber's right to use his telephone in ways which are privately beneficial without being publicly detrimental." In response to this ruling, AT&T filed the revised tariffs which are now effective and which the Commission accepted as being consistent with the *Carterfone* ruling. *AT&T "Foreign Attachment" Tariff Revision*, 15 FCC 2d 605 (1968).

31. Because *Carterfone* and the implementing tariffs operate upon the terms and conditions under which subscriber-owned equipment may be interconnected to the telephone network, and because that network is used in common for intrastate and interstate services, AT&T recognized that uniform interconnection practices must apply to both services. Hence, the Bell System companies promptly filed conforming revision to their "foreign attachment" tariffs on file with the several State commissions applicable to intrastate services. No carrier, State commission or other party pursued judicial review of the Commission's *Carterfone* ruling or challenged the jurisdiction of the Commission to make that ruling or to accept the tariffs filed in response thereto.

32. The proponents of the North Carolina proposed rule, relying principally upon Sections 2(b) and 221(b) of the Communications Act contend, variously, that Congress reserved to the States the exclusive right to regulate exchange and other intrastate services including the use of customer-owned equipment in connection with such services; that this asserted exclusive right bars any preemptive effect of Federal action in matters of customer interconnection; and that the States are not barred from taking action concerning customer interconnection even though such action may derogate or conflict with the Federal ruling.<sup>21a</sup> The proponents of this position are less than clear as to the practical effects upon telephone service resulting from conflicting Federal and State rulings except to suggest that separate facilities could be provided for interstate and intrastate services or that the Commission should simply defer to the State commissions as to the appropriate rule.

33. It is our conclusion that this construction of Sections 2(b) and 221(b) is erroneous for the following reasons:

34. First, as we discussed at the outset, the Commission's powers to regulate interstate and foreign communications services are comprehensive and pervasive and embrace the terms and conditions under which customers shall be reasonably permitted to use their own equipment in connection with such services. The provisions of Section 2(b) and 221(b) are to be construed in light of this overall statutory scheme. For, the "Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation" (*United States v. Storer Broadcasting Company*, 351 U.S. 192, 203 (1956)). As the Court of Appeals for the District of Columbia Circuit recognized in *General Telephone Co. of Cali-*

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<sup>21a</sup> We note that counsel for AT&T conceded at oral argument that Section 221(b) is not determinative of the jurisdictional question (Tr. 102-103).

*fornia v. F.C.C.* (413 F.2d 390), the Act "must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole" (413 F. 2d at 398). For, "fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication" (*id.*, at 401).

35. Second, because of the commonality of telephone company plant and facilities used to provide intrastate and interstate services and the indivisibility of such plant and facilities, rules governing interconnection of customer-owned equipment must be the same for interstate and intrastate services. Here it is to be stressed that customer-owned equipment which is now available and in demand is either incapable of distinguishing in its use and operation between intrastate and interstate calls, or where such capability technically exists, it would make no sense from an economic or operational standpoint for the customer to arbitrarily confine its use to interstate service.

36. Third, this Commission has repeatedly exercised jurisdiction over facilities and instrumentalities used in interstate communication despite the circumstances that such facilities are used also to provide intrastate service. See *AT&T-TWX*, 38 FCC 1127 (1965); *DOD v. General Telephone Co.*, 38 FCC 2d 803, 807-812 (Review Board 1973), *aff'd* FCC 73-854 (1973); and the precedents cited in these two cases.

In an early Commission case, *Use of Recording Devices*, 11 FCC 1033 (1947), we rejected arguments of the carriers that, under Sec. 2(b)(1) and 221(b) of the Act, "the jurisdiction of the Commission to make an order regulating the use of recorders is limited to use in connection with facilities which are exclusively interstate" (11 FCC at 1046) and stated that this argument ignored "the basic grant of jurisdiction to this

Commission over interstate and foreign communications by wire or radio (see Communications Act, see 1 and 2(a)) and it pays no heed to the fact of operation of telephone recording devices" (11 FCC at 1047).

We stated further that regulation of interstate and foreign message telephone service "necessarily involves all the facilities, charges, classification, practices, service and regulations used in the rendition of the service, and regulation of such service must be able to deal with all or any of the matters so involved if it is to be effective" (11 FCC at 1047).

In 1953 we stated in the *Katz* case that:

"The fact that the same instruments are used for both interstate and intrastate services and that intrastate service is subject to state and local regulation does not alter the Commission's duties and obligations with respect to interstate telephone facilities. Were the Commission to exercise its jurisdiction only where the telephone facilities in question were exclusively interstate in character, it would result in virtually complete abdication from the field of telephone regulation by the Commission" *Katz v. ATT*, 8 RR 919 at 923 (1953).

Later in *Jordaphone Corp. of America v. ATT*, 18 FCC 644 (1954), we rejected the carriers' contention that because tariff regulations prohibiting the use of customer-owned automatic answering devices affected intrastate and exchange telephone service, the Commission was without jurisdiction to entertain a complaint alleging the unreasonableness of such regulations. Although we required the carriers to file revised tariffs allowing the use of answering devices where authorized by state or local authorities, we stated:

"Despite the fact that the individual telephone installation is used more extensively for intrastate tele-

phone communications than for interstate and foreign toll telephone service, it is clear that this Commission, pursuant to sections 1 and 2(a) of the Communications Act of 1934, as amended (47 U.S.C. 151, 192(a)), has jurisdiction insofar as the 1.2 percent interstate and foreign toll message calls are concerned" 18 FCC at 670.

We also stated that while we hesitated to exercise jurisdiction in such a way as to preclude exercise of jurisdiction by state or local bodies, we would do so where, "The record reveals a very clear need for such action so far as interstate telephone service is concerned" 18 FCC at 670.

We expressly found such a need in the *ATT-TWX* and *DOD v. GTE* cases quoted above. We stated in *ATT-TWX* that:

"To the extent the carrier provides station equipment for use in connection with both interstate and intrastate communication, the Commission has authority to regulate the charges for interstate use of those facilities in order to insure lawful performance of the interstate service" (38 FCC at 1132) and that

"We find nothing in section 2(b)(1) which imposes any limitation upon our full authority over interstate communication service. For us to conclude that, because facilities and instrumentalities are used in intrastate as well as in interstate communication service, we do not have jurisdiction or that we should not exercise it, would leave a substantial portion of the interstate communication service unregulated. We do not believe Congress so intended" (38 FCC at 1133).

Our decision in that case concludes that "... on the basis of statements and comments presented herein by the parties it is not practicable to establish separate interstate and intrastate schedules of charges ..." 38

FCC at 1134. A similar conclusion was reached in *DOD v. GTE*.

The courts have held that transmission facilities located entirely within one state are not immune from Commission regulation if those facilities are used for interstate communications. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Ward v. Northern Ohio Telephone Co.*, 300 F. 2d 816 (6 cm.) cert. denied, 371 U.S. 820 (1962); *California Interstate Co. v. F.C.C.*, 328 F. 2d 556 (D.C. Cir. 1969). The Courts have also held that Commission regulation of interstate communication does not end at a local switching apparatus but runs to the ultimate destination of the transmission. *U.S. v. ATT*, 57 F. Supp. 451 (S.D. N.Y. 1944), aff'd. sub nom. *Hotel Astor, Inc. v. U.S.*, 325 U.S. 837 (1945). And in *Ivy Broadcasting Co. v. A.T.T.*, 391 F. 2d 486 (2d Cir. 1968) the Court held that when a local transmission facility is included in an interstate transmission network, the regulation of the interstate uses of that facility lies exclusively with the F.C.C.

37. Fourth, the legislative history of the Communications Act clearly shows that in enacting Sections 2(b) and 221(b), the Congress was primarily concerned with the preservation of traditional State jurisdiction over intrastate rates and services, i.e., to make certain that the Federal Communications Commission could not regulate intrastate rates and services in the manner that intrastate transportation's rates and services were being regulated by the Interstate Commerce Commission. Clearly, Congress sought to exclude the FCC from regulation of truly intrastate service, including those local exchange services referred to in Section 221(b) where such local exchange area straddles a state border and to this limited extent constitutes interstate service. But the latter is the only aspect of interstate service that the Congress felt warranted in reserving to

the States.<sup>22</sup> There is nothing in the Communications Act or its legislative history which supports the position taken by the proponents of the North Carolina proposed rule that Section 2(b) and/or 221(b) reflects a Congressional intent that where common exchange plant is used to provide both exchange and other intrastate services as well as interstate services, a State may, in effect, determine the terms and conditions upon which such common plant is to be used for interstate service. It is one thing to exempt intrastate services from Federal jurisdiction. It is quite a different matter to argue that by virtue of this exemption plant used in common for both intrastate and interstate services is beyond Federal jurisdiction and that subscribers can be subjected to a melange of regulations, determined by each of 50 separate jurisdictions, as to the terms and conditions upon which they shall have access to and use of the telephone network for interstate services. If each State were to be free to establish its own rules governing interconnection for the purposes of intrastate services, uniform non-discriminatory interstate service throughout the country would be rendered difficult if not impossible. Because of the indivisibility of the network, it is impossible, from a practical economic and operating standpoint, for a common carrier to comply with conflicting Federal and State regulation.<sup>23</sup> Moreover, if a State were to bar interconnection of customer-provided equipment for intrastate service in derogation of a Federal rule, the carrier would be placed in an untenable position of having to violate either the State

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<sup>22</sup> See e.g., 78 Cong. Rec. 8823 (May 15, 1934); 78 Cong. Rec. 8846-8847 (1934); H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 2, 3 (1934); 78 Cong. Rec. 10313 (1934); S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10316-17 (1934). See also, *Southwestern Bell Telephone Co. v. United States*, 45 F. Supp. 403, 404 (W. D. Mo. 1942).

<sup>23</sup> And clearly it would make no economic or operational sense to provide separate facilities for intrastate and interstate services in order to comply with conflicting rules.

ruling or the Federal ruling. All of these results would frustrate the Congressional purpose in establishing the Commission to "make available . . . a rapid, efficient, Nation-wide . . . communication service with adequate facilities at reasonable charges . . ." (Section 1).

38. For all of the foregoing reasons, this Commission has primacy in authority over the terms and conditions governing the interconnection of customer-provided equipment to the nationwide telephone network. No State regulation can oust this Commission from its clear jurisdiction over interstate communications and the regulation of the terms and conditions governing such communication, including the right of subscriber interconnections. A "holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulation is a physical impossibility for one engaged in interstate commerce." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963). See also cases cited in footnote 6 above.

39. Although we have asserted Federal primacy in this area, it does not follow that the State commissions have no proper interest or that they are to be denied a participating role and thus become merely onlookers to purely unilateral action by the FCC. Congress, at the time that it enacted the Communications Act, recognized the potential impact of the regulatory power given to this Commission over intrastate matters and the States' regulation thereof, particularly in those instances where service to the public involved the use of common plant and facilities. Accordingly, Congress established a statutory mechanism to make it possible that State concerns and viewpoints would be duly reflected in the Commission's actions in areas of common regulatory concern. Specifically, Section 410 of the Communications Act makes provision for State participation in Commission proceedings through several types of procedures including the use of Federal-State joint boards to preside over hear-

ings and to make recommendations to the Commission as to the ultimate decision the FCC should reach in the particular matter. In 1971, Congress further amended the Act by adding a provision (Section 410(c)) making mandatory, rather than permissive, the use of the Federal-State Joint Board procedures to resolve separation issues with respect to common carrier property. It is relevant to note in this case that this amendment, enacted just two years ago, again stressed the primacy of the Federal jurisdiction by reserving to this Commission the final decision-making powers.<sup>24</sup>

40. In the current situation, we have respected the interest of the States in this matter of interconnection, as well as the effect of any ruling which we may make upon intrastate services. Accordingly, as noted above, to accommodate to the fullest extent possible all reasonable and legitimate concerns of such State jurisdictions we have established a Joint Board pursuant to the provisions of Section 410 to address itself to the question of whether customer interconnection should be liberalized beyond that now permissible under our *Carterfone* ruling and the implementing tariffs, and, if so, what conditions, rules, regulations and other requirements should be imposed in connection with

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<sup>24</sup> The Senate Committee Report (p. 2) notes that while the Federal and State "jurisdictions are separate for interstate and intrastate services, the plant facilities are to a great extent the same for both." The Report also recognizes that the Federal Government pre-empts the States in the area of Federal jurisdiction, stating:

"Although the States regulate, in the aggregate, 70 percent of Bell's plant investment, no one State has jurisdiction over as much as the approximately 30 percent regulated by the Federal Communications Commission, and the interests of the various States can be different. More importantly, the Federal Government pre-empts the States in the area of Federal jurisdiction. Thus, if the Commission declares its rate base to include certain costs, these costs are not used in determining a State's rate base; conversely, if the Federal Communications Commission does not use certain costs, the State may be left with these costs in determining its rate base—and correspondingly higher rates for local services to the local consumer." (S. Rept. 362, 92d Cong., 1st Sess. p. 3).

such further liberalization. *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539, 542 (1972).

41. Turning now to the effects of the actions we have taken in the interconnect area on State action in the same area, we point out that our actions do not foreclose any State from taking action of its own in the interconnect area so long as such action does not derogate the interstate ruling. A principal thrust and aim of the interstate tariff filed in compliance with our *Carterfone* ruling is to make certain that the telephone network and the employees operating and maintaining that network will be protected from any harm that may be occasioned by the use of customer-owned equipment or systems. Hence, the tariff requirement that such equipment or systems can be directly connected to the telephone facilities only through protective interface devices offered by the telephone companies pursuant to those tariffs. Neither the *Carterfone* ruling nor these tariffs prevent any State from providing *additional* options to customers with respect to interconnection provided that they are alternatives to, rather than substitutes for, the requirements specified in the interstate tariffs, and provided further that such regulations accomplish the protective objectives of the interstate tariff regulations and in no way permit interference with or impairment of interstate services. Any such additional option authorized by State action would, of course, be required under Section 203 of the Communications Act, to be properly reflected by the telephone companies in their tariffs on file with this Commission applicable to interstate service. Under such a procedure, this Commission would have an opportunity to consider each such additional customer option in terms of its effects upon interstate service. A case in point is represented by the New York Public Service Commission's action with respect to an additional interface arrangement offered by the Rochester Telephone Company (Opinion No. 72-18, Case 26064 (August 21, 1972)).

42. Nor do our actions in the interconnect area foreclose any State from the full exercise of its investigatory powers with respect to the effects of interconnection as related to the quality of telephone service or the regulation by the State of intrastate rate structures and revenue requirements for services subject to its jurisdiction. This Commission has been monitoring interconnection to ascertain the nature and extent of any harm caused thereby. We have also been monitoring the manner and effectiveness with which the telephone companies are administering their tariff regulations, with particular reference to the availability and efficiency of the interface protective arrangements required by such tariffs. We would expect the State commissions to do likewise in discharging their responsibilities with respect to the maintenance of efficient intrastate service. A continued and systematic exchange of information on these matters between the FCC and the several states would be mutually beneficial and in furtherance of our common objective of promoting the public interest in efficient service. Also, this type of Federal-State interaction would enhance the ability of this Commission to take prompt appropriate corrective measures indicated to be warranted by the information generated.

43. There is one additional matter which should be addressed at this time even though it does not relate directly to the issues before us. This is the concern expressed by telephone companies and certain elements of the regulatory community with respect to what they believe to be potential harmful effects of interconnection on telephone service and intrastate rates and revenue requirements applicable to basic exchange services. In general, it has been urged that to the extent our policy established a competitive market for terminal equipment and systems, it forces the carriers to reduce their rates in order to compete in this market for such equipment. This, in turn, it is alleged, causes a loss of revenue to the carriers which prior to competition had been available to offset revenue requirements related to

basic exchange services, and thereby requires higher rates for such basic services. It is urged that until these consequences are fully explored and evaluated as to their effects on the costs and availability of basic exchange service there should be no further liberalization of interconnection. It has also been suggested that until the *Carterfone* policy and its effects have been reevaluated, there should be a moratorium on permissible interconnection of any kind.

44. In our Notice of Inquiry in Docket No. 19528, we gave no specific consideration to questions as to whether and to what extent there might be adverse economic consequences from further liberalization of customer interconnection by the ultimate adoption of any of the proposals before us in that proceeding. We therefore specified in our First Supplemental Notice in Docket No. 19528 that we would "cover such issues in an appropriate manner by further supplemental notices in the near future."

45. In light of representations made to us in connection with the instant proceeding, we propose to broaden our review of potential adverse effects to include alleged economic effects which may result from currently permitted use of customer-provided equipment. We shall, at an early date, formulate and release specific issues designed to elicit the necessary information and provide a framework for proper decision-making.

46. Any such expansion of the issues in Docket No. 19528 or in a separate proceeding is not to be construed as an indication that we have any reason to question the merits of our *Carterfone* policy or the public benefits we perceive to have resulted from that policy thus far. Our purpose will be instead to afford an opportunity to the critics of customer interconnection to substantiate and document by meaningful and probative evidence the specific nature and extent of the economic or other detriments they allege are or will be the consequence of customer

interconnection as it is presently authorized or as it might be liberalized in accordance with any of the proposals now being considered in Docket No. 19528. We will also expect them to make a persuasive showing as to whether, to what extent, and in what specific areas the markets for interconnect equipment and systems have the unique characteristics which would warrant relegating that market to monopoly supply by the telephone companies rather than to competitive sources of supply.

47. In fairness to all parties concerned, we deem it in order to state our view at this time that under a free enterprise system, particularly in this instance where there is an existing and growing competitive market for customer-provided interconnect equipment, any governmental action designed to prohibit or restrict the competitive operation of such a market would be of questionable validity and legality unless supported by compelling and cogent public policy considerations. Our purpose in enlarging the proceedings in Docket 19528 (or in a separate proceeding) will be to ascertain whether such public policy considerations are present as to warrant the extension of the natural monopoly concept to the interconnect market.

48. We now address certain significant issues relating to Title III of the Act that were not specifically covered in the briefs and oral argument. These questions relate to the implications of the proposed rule of NCUC upon our exclusive jurisdiction under the Act to license radio facilities.

49. Both Sections 2(b) and 221(b) of the Act, which are relied upon heavily by the proponents of the NCUC rule, begin with language that makes it clear that State action must yield to the sole jurisdiction and power of the Commission to license radio facilities in the public interest. This licensing jurisdiction applies to radio facilities irrespective of whether they are to be used for interstate or intrastate purposes. In North Carolina, as in every other State, the

telephone companies and many of their interconnecting customers are users of radio facilities licensed by this Commission. Under Title III of the Act all licensees are subject to the requirements that they operate in the public interest and in accordance with national policies as expressed in the Act and as developed by our regulatory actions. (See e.g., *Guardband Decision*, 12 FCC 2d 341 (1968); 14 FCC 2d 269 (1968); 409 F 2d 322 (1969)).

50. Thus, our findings herein that the Federal role is paramount and controlling in the area of interconnection to the nationwide telephone network is premised not only upon the provisions of Title I and Title II, of the Act as heretofore discussed, but also up the provisions of Title III and the national policies reflected therein.

51. A key provision of the proposed rule of the NCUC is that "The telephone company shall own, service and be fully responsible for and accountable to the Utilities Commission and to its customers for adequate service and maintenance of *all equipment used in telephone service in North Carolina*" (emphasis added). *Telerent Leasing Corp.*, 43 FCC 2d 487, at page 491. This NCUC rule, if adopted and made effective, would mean that all private mobile and other radio systems licensed by us in North Carolina would no longer be interconnected with the switched telephone system and this would be in direct conflict with our policy of liberal licensing of private radio systems and our policy under *Carterfone* of harmless interconnection of all such radio systems with the common carrier network. Indeed, the interconnect facilities involved in the *Carterfone* case were private mobile radio systems which were being furnished by the customers themselves in substitution for radio systems otherwise available from telephone companies as part of their telephone service offerings to the public.

52. With respect to that portion of the advisory ruling by the Attorney General of the State of Nebraska that a

hotel or motel could not interconnect privately-owned communications equipment with the facilities and services of a telephone company without certification as a common carrier, the following observations appear to be in order. We do not believe that hotels or motels should be treated any differently from other businesses so far as the ownership, operation and interconnection of their own equipment or systems are concerned. With respect to interstate service, we perceive no reason why a hotel or motel should be obliged to lease from the telephone company rather than own its own internal equipment or system. Nor do we perceive why its lease of facilities from the local telephone company rather than its ownership of such facilities procured from other sources should affect any determination of its status as a regulated entity under State law or of its right to interconnection.

53. We recognize, however, that under the statutes or judicial rulings of a particular State, hotels or motels may, under appropriate circumstances, be subject to State regulation as common carriers or public utilities and require certification as such. Whether this is the situation in the State of Nebraska, we are not called upon to ascertain nor would it be appropriate for us to judge. This is a question that must be determined in the first instance within the State jurisdiction. We merely note in passing that national policy under *Hushaphone* and *Carterfone* requires that all customers, including hotels and motels be free to obtain their own systems from either the telephone company or non-telephone company sources and to interconnect such systems with the national network for interstate communications, subject only to reasonable requirements to prevent harm to the network, its employees or service of others. Furthermore, if any hotel or motel is definitely termed a common carrier by state law, such hotel or motel could apply to us for interstate carrier-to-carrier interconnection under Section 201(a) of the Act and could seek division

of revenue with the telephone companies participating in such interconnect service. It could also seek such other relief as may be necessary to enable it to render interstate communications service. We will retain jurisdiction in this matter to consider the effect of State action in this area.

54. Finally, we take notice of the General Order of the Corporation Commission of the State of Oklahoma, issued January 14, 1974, which adopts rules governing telephone companies and telecommunications in Oklahoma. Rule 16 (a) provides that:

(a) Authority to Interconnect: No telephone company shall connect or permit connection of any of its lines, facilities or equipment with any lines, facilities or equipment owned, furnished, maintained or serviced by another person furnishing telephone or telecommunications service, unless that person has been granted a certificate of convenience and necessity therefore by the Commission.

Rule 16 (b) states:

(b) Customer Owned Equipment: This rule shall not prevent the connection of equipment owned exclusively by the customer, and not owned, furnished, maintained or serviced by any other person, when such customer owned equipment is installed and connected in accordance with the approved rules and conditions of service of the telephone company.

55. Rule 16 (a) on its face encompasses more than the interconnection of customer provided equipment and extends to interconnection between the facilities of a telephone company and the system of another carrier, such as a specialized or domestic satellite carrier offering interstate services. As such it poses a clear conflict with the Communications Act and our interconnection policy in the

specialized carrier and domestic satellite fields. With respect to the provision of interstate and foreign communications, Sections 214 and 201 (a) of the Communications Act grant this Commission exclusive authority to issue certificates of convenience and necessity and to order interconnection between carriers. Moreover, we have imposed a requirement that telephone companies shall furnish to specialized and satellite carriers such interconnection facilities as are essential to the provision of their authorized interstate services, pursuant to tariffs filed with this Commission. *Specialized Common Carrier Services*, 29 FCC 2d 870, 940 (1971); *Second Report and Order* in Docket No. 16495, 35 FCC 2d 844, 856 (1972); *AT&T*, 42 FCC 2d 654, 655-661 (1973). The telephone companies involved are not excused from prompt compliance with our interconnection policy and orders because of the rule adopted by the Oklahoma Commission.

56. Further, with respect to Rule 16 (b), we note that our *Carterfone* ruling and the implementing tariffs do not distinguish between customer-owned and customer-leased equipment. For purposes of interstate service, we see no reason why there should be any absolute bar against interconnection of customer-leased equipment maintained or serviced by the lessor. In the case of computer equipment leased from IBM Corp., for example, the lessor may be much better qualified to maintain and service the equipment than the customer. Accordingly, in this area also the Oklahoma rule squarely conflicts with the Federal ruling.

57. In light of all of the foregoing, It Is HEREBY ORDERED that the petition for a declaratory ruling Is GRANTED to the extent reflected herein and Is OTHERWISE DENIED.

58. It Is FURTHER ORDERED that the motion of NATA for expedited action and immediate relief Is DISMISSED as moot.

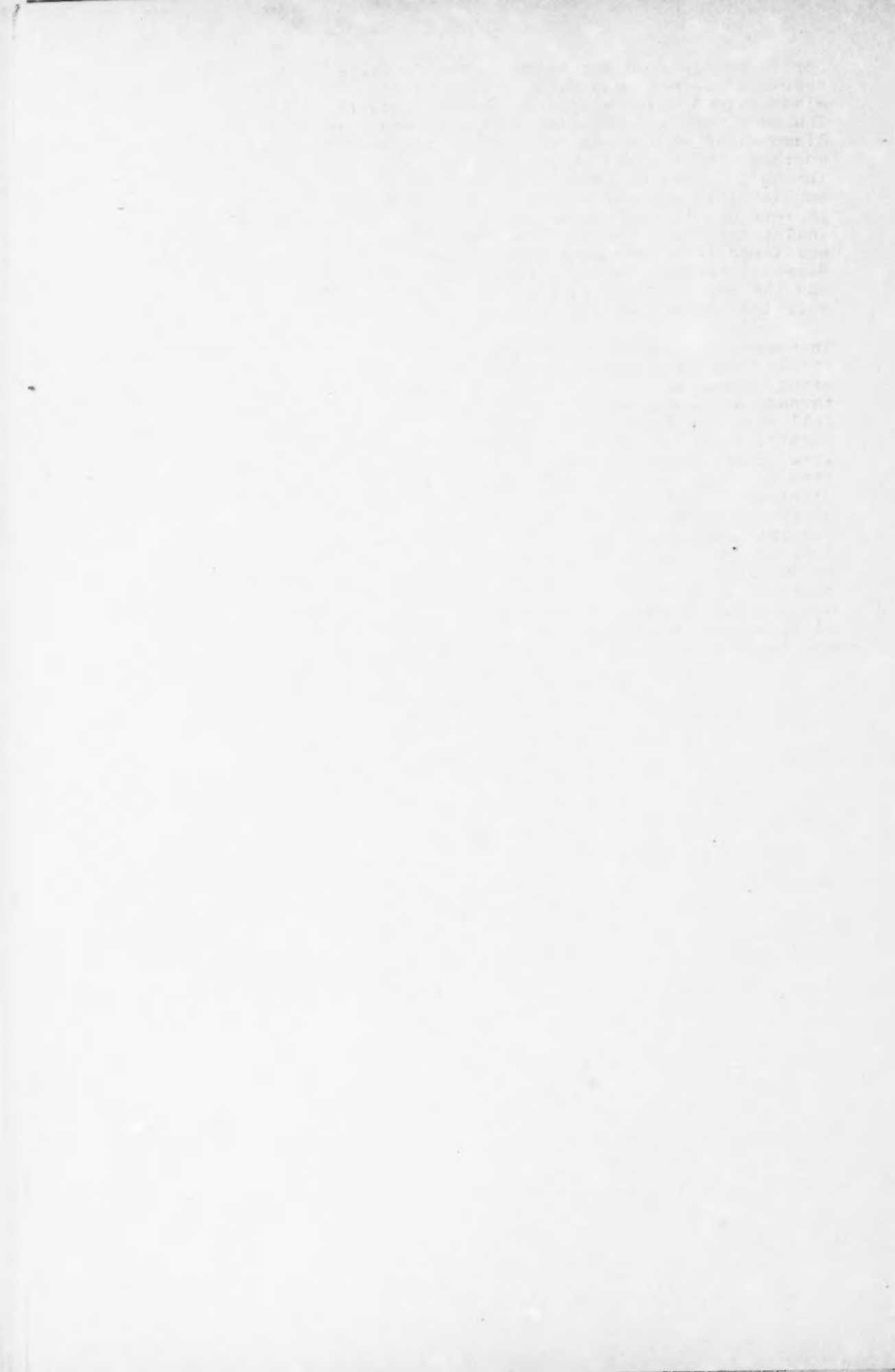
59. IT IS FURTHER ORDERED that the motions of NARUC and Southern Pacific to correct the transcript of oral argument ARE GRANTED.

60. IT IS FURTHER ORDERED that the Commission retains full jurisdiction over the question discussed in paragraphs 52 and 53 above.

FEDERAL COMMUNICATIONS COMMISSION,  
VINCENT J. MULLINS, *Secretary*.



## APPENDIX C



UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 74-1449

AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND  
ASSOCIATED BELL SYSTEM COMPANIES,  
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE  
UNITED STATES OF AMERICA,  
*Respondents.*

NATIONAL RETAIL MERCHANTS ASSOCIATION, INC., MCI TELE-  
COMMUNICATIONS CORPORATION, AND SOUTHERN PACIFIC  
COMMUNICATIONS COMPANY, *Intervenors.*

TELERENT LEASING CORP., CRESCENT INDUSTRIES, INC., LONG  
ENGINEERING COMPANY, PETTY COMMUNICATIONS, INC.,  
TELE-SOUND COMPANY, INC., NORTH AMERICAN TELE-  
PHONE ASSOC., *Intervenors.*

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL  
COMMUNICATIONS COMMISSION

THIS CAUSE came on to be heard upon the petition of American Telephone and Telegraph Company and Associated Bell System Companies for review of an order issued against it by the Federal Communications Commission, in proceedings before the said Agency known upon its records as case no. 19808; upon a certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the memorandum order of the Federal Communications Commission is sustained consistent with the opinion of this Court filed herewith.

**FILED: April 14, 1976**

**/s/ WILLIAM K. SLATE, II**  
**Clerk**

**A True Copy, Teste: William K. Slate II, Clerk**  
**/s/ By ILLEGIBLE**  
**Deputy Clerk**

## APPENDIX D



UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

Nos. 74-1220; 74-1390; 74-1449; 74-1514; 74-1515; 74-1516  
Nos. 74-1220; 74-1390; 74-1449; 74-1514; 74-1515; 74-1516

**Order**

Certain of the parties have filed petitions for rehearing on account of the opinion in this court filed in these cases April 5, 1976, and decided April 14, 1976, and one of the petitions requests rehearing en banc.

**I**

As a member of the panel and as a circuit judge in regular active service, Judge Widener requests a poll of the court on the petition for rehearing en banc and votes for it. All other five judges in regular active service being disqualified in these cases, it is not possible to obtain a majority of the judges in regular active service to order a rehearing en banc. FRAP 35(a).

It is accordingly ORDERED that rehearing en banc is denied.

**II**

The panel has considered the petitions for rehearing. Judge Hastie died immediately subsequent to the filing of this opinion. Judge Widener votes for rehearing. Judge Tuttle votes against rehearing.

It is accordingly ORDERED that rehearing of the cases by the panel is denied by an evenly divided court.

**III**

The court, on its own motion, stays the mandate in these cases for a period of thirty days from the day this order is filed.

2d

With the concurrence of Judge Tuttle.

Edwards  
For the Court

## **APPENDIX E**



**RELEVANT STATUTORY PROVISIONS****Specified Provisions of the Communications Act of 1934**

**Section 1, 47 U.S.C. § 151, provides:**

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

**Section 2, 47 U.S.C. § 152, provides:**

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier

engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communications solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection.

Section 3, 47 U.S.C. § 153, provides in part:

For the purposes of this chapter, unless the context otherwise requires—

(a) “Wire communication” or “communication by wire” means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) “Radio communication” or “communication by radio” means the transmission by radio of writing, signs, signals, pictures and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

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(e) “Interstate communication” or “interstate transmission” means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia,

to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(f) "Foreign communication" or "foreign transmission" means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States.

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(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

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(r) "Telephone exchange service" means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

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(t) "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

(u) "Connecting carrier" means a carrier described in clauses (2), (3) or (4) of section 152(b) of this title.

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Section 4, 47 U.S.C. § 154, provides in part:

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(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

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Section 201, 47 U.S.C. § 201, provides:

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different

charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Section 202, 47 U.S.C. § 202, provides:

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give an undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of \$500 for each such offense and \$25 for each and every day of the continuance of such offense.

Section 203, 47 U.S.C. § 203, provides:

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall

designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations,

or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense.

Section 204, 47 U.S.C. § 204, provides:

Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its

decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 205, 47 U.S.C. § 205, provides :

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of \$1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Section 214, 47 U.S.C. § 214, provides :

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or oper-

ate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such

line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the

United States \$100 for each day during which such refusal or neglect continues.

Section 221, 47 U.S.C. § 221, provides in part:

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(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

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Section 301, 47 U.S.C. § 301, provides:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its

borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

Section 410, 47 U.S.C. § 410, provides:

(a) Except as provided in section 409 of this title, the Commission may refer any matter arising in the administration of this chapter to a joint board to be composed of a member, or of an equal number of members, as determined by the Commission, from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed. For purposes of acting upon such matter any such board shall have all the jurisdiction and powers conferred by law upon an examiner provided for in section 1010 of Title 5, designated by the Commission, and shall be subject to the same duties and obligations. The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State or by the Governor if there is no State commission, and appointed by the Federal Communications Commission. The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

(b) The Commission may confer with any State commission having regulatory jurisdiction with respect to carriers, regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized under such rules and regulations as it shall prescribe to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized

in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions, as referred to in sections 302(b) and 305(f) of Title 49, and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

#### **Specified Provisions of Title 56 of Virginia Code Annotated**

Section 56-232 provides:

§ 56-232. Public utility and schedules defined.—The term "*public utility*" as used in §§ 56-233 to 56-240 and 56-246 to 56-250 shall mean and embrace every corporation (other than a municipality), company, individual, or association of individuals or cooperative, their lessees, trustees, or receivers, appointed by any court whatsoever, that now or hereafter may own, manage or control any plant or equipment or any part of a plant or equipment within the State

for the conveyance of telephone messages or for the production, transmission, delivery, or furnishing of heat, chilled air, chilled water, light, power, or water, or sewerage facilities, either directly or indirectly, to or for the public.

But the term "public utility" as herein defined shall not be construed to include any corporation created under the provisions of Title 13 of the Code of Virginia, and shall not be construed to include any corporation created under the provisions of Title 13.1 of the Code of Virginia unless the articles of incorporation expressly state that the corporation is to conduct business as a public service company.

The term "*schedules*" as used in §§ 56-234 through 56-245 shall include schedules of rates and charges for service to the public and also contracts for rates and charges in sales at wholesale to other public utilities or for divisions of rates between public utilities, but shall not include contracts of telephone companies with municipal corporations or the State government or contracts of other public utilities with municipal corporations or the federal or State government, or any contract executed prior to July one, nineteen hundred fifty.

Section 56-233 provides:

§ 56-233. Service defined.— The term "service" is used in this chapter in its broadest and most inclusive sense and includes not only the use of accommodations afforded consumers or patrons, but also any product or commodity furnished by any public utility and equipment, apparatus, appliances and facilities devoted to the purposes in which such public utility is engaged and to the use and accommodation of the public.

Section 56-234 provides:

§ 56-234. Duty to furnish adequate service at reasonable and uniform rates.—It shall be the duty of every public utility to furnish reasonably adequate service and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring same, and to charge uniformly therefor all persons or corporations using such service under like conditions. The charge for such service shall be

at the lowest rate applicable for such service in accordance with schedules filed with the Commission pursuant to § 56-236. But nothing herein contained shall be construed as applicable to schedules of rates, or contracts for services rendered by any telephone company to any municipal corporation or to the State government, or by any other public utility to any municipal corporation or to the State or federal government. The provisions hereof shall not apply to or in any way affect any proceeding pending in the State Corporation Commission on or before July one, nineteen hundred fifty, and shall not confer on said Commission any jurisdiction not now vested in it with respect to any such proceeding.

Section 56-234.2 provides that:

§ 56-234.2. Annual review of rates.—The Commission shall review the rates of any public utility on an annual basis when, in the opinion of the Commission, such annual review is in the public interest.

Section 56-235 provides that:

§ 56-235. When Commission may fix rates, schedules, etc.—If upon investigation the rates, tolls, charges, schedules, or joint rates of any public utility operating in this State shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of law, the State Corporation Commission shall have power to fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be just and reasonable.

Section 56-236 provides that:

§ 56-236. Public utilities required to file, etc., schedules of rates and charges; rules and regulations.—Every public utility shall be required to file with the Commission and to keep open to public inspection schedules showing rates and charges, either for itself, or joint rates and charges between itself and any other public utility. Every public utility shall file with, and as a part of, such schedules, copies of all rules and regulations that in any manner affect the rates charged or to be charged.

Section 56-237 provides that:

§ 56-237. How changes in rates effected.—No change shall be made in any schedule filed pursuant to the preceding section (§ 56-236), including schedules of joint rates, except after thirty days' notice to the Commission, and to the public, in such manner as the Commission may require, and all such changed rates, tolls, charges, rules, and regulations shall be plainly indicated upon existing schedules or by filing new schedules in lieu thereof not less than thirty days prior to the time the same are to take effect; provided, that the Commission may, in particular cases, authorize or prescribe a less time in which changes may be made; and provided further that, in the case of water companies, the notice to the public shall set forth the proposed rates and charges.

Section 56-238 provides that:

§ 56-238. Suspension of proposed rates, etc.; investigation; fixing reasonable rates, etc.—The Commission, either upon complaint or on its own motion, may suspend the enforcement of any or all of the proposed rates, tolls, charges, rules or regulations, for a period not exceeding sixty days, during which time it shall investigate the reasonableness or justice of the proposed rates, tolls, charges, rules and regulations and thereupon fix and order substituted therefor such rates, tolls, charges, rules and regulations as shall be just and reasonable. Notice of the suspension of any proposed rate, toll, charge, rule or regulation shall be given by the Commission to the public utility, prior to the expiration of the thirty days' notice to the Commission and the public heretofore provided for. If the Commission, in exceptional cases, is unable to conclude its investigations and hearing within the aforesaid period of sixty days, the Commission may, for good reasons shown and spread upon the record, further suspend from time to time the operation of the proposed rates, tolls, charges, or regulations for such moderate and reasonable periods as may be requisite and necessary to complete the investigation; provided, however, such periods of further suspension shall not exceed a total of ten months.

Section 56-239 provides that:

§ 56-239. Appeal from action of Commission.—The public utility whose schedules shall have been so filed or the Commonwealth or other party in interest or party aggrieved may appeal to the Supreme Court from such decision or order as the Commission may finally enter. Upon the granting of such appeal the Supreme Court may award or refuse a writ of supersedeas, and, if a writ of supersedeas be awarded, it may suspend the operation of the action appealed from in whole or in part. Alternatively, the Supreme Court in its discretion may authorize putting into effect the schedule of rates so filed and suspended by the Commission or the schedule of rates existing at the time of the filing of the schedule upon which the investigation and hearing have been had, or require the inauguration of the schedule of rates as ordered by the Commission, until the final disposition of the appeal. But, prior to the final reversal of the order appealed from by the Supreme Court, no action of the Commission prescribing or affecting rates or charges shall be delayed, or suspended in its operation, by reason of any appeal by the party whose rates or charges are affected, or by reason of any proceeding resulting from such appeal until a suspending bond payable to the Commonwealth has been executed and filed with the Commission with such conditions, in such penalty, and with such surety thereon, as the Commission, subject to review by the Supreme Court, may deem sufficient. In any appeal from action of the Commission prescribing or affecting the rates or charges of a public utility, such bond, or if no bond is required, the order of the Supreme Court, shall expressly provide for the prompt refunding to the parties entitled thereto of all charges which may have been collected or received, pending the appeal, in excess of those fixed, or authorized by the final decision on appeal, with interest from the date of the collection thereof. But no bond shall be required of the Commonwealth. Any bond required under this section shall be enforced in the name of the Commonwealth before the Commission or before any court having jurisdiction, and the process and proceedings thereon shall be as provided by law upon bonds of like character required to be taken by courts of record of this State.

Section 56-240 provides that:

§ 56-240. Proposed rates, etc., or changes thereof, not suspended, effective subject to later change by Commission; refund or credit; appeal.—Unless the Commission so suspends such schedule of rates, tolls, charges, rules and regulations, or changes thereof, the same shall go into effect as originally filed by any public utility as defined in § 56-232, upon the date specified in the schedule subject, however, to the power of the Commission, upon investigation thereafter, to fix and order substituted therefor such rate or rates, tolls, charges, rules, or regulations, as shall be just and reasonable, as provided in §§ 56-235 and 56-247 of this Code. The Commission may thereupon, in its discretion, order such public utility to refund or give credit promptly to the parties entitled thereto any portion or all of the charges originally filed by the public utility which may have been collected or received in excess of those charges finally fixed and ordered substituted therefor by the Commission.

From any action of the Commission in prescribing rates, refunds, credits, tolls, charges, rules and regulations or changes thereof, an appeal may be taken by the corporation whose rates, refunds, credits, tolls, charges, rules and regulations or changes thereof are affected, or by the Commonwealth, or by any person deeming himself aggrieved by such action.

Section 56-241 provides that:

§ 56-241. Rates of telephone companies.—The power of the Commission over the rates of telephone companies shall be as defined by this chapter and by § 56-481 of chapter 15 of this title.

Section 56-242 provides that:

§ 56-242. Temporary reduction of rates.—Whenever the Commission, pending an investigation had upon its own motion, or upon complaint, is of the opinion and so finds after an examination of any report or reports, annual or otherwise, filed with the Commission by any public utility, together with any other facts or information which the Commission may acquire or receive from an investigation

of the books, records or papers, or from an inspection of the property of such public utility, that the net income of such public utility, after reasonable deductions for depreciation and other proper and necessary reserves, is in excess of the amount required for a reasonable return upon the value of such public utility's property, used and useful in rendering its service to the public, and if the Commission is of the opinion and so finds in such cause that a hearing to determine all of the issues involved in a final determination of rates of service will require more than ninety days of elapsed time, the Commission may, in case of such emergency, enter a temporary order, after not less than ten days' notice to such public utility of its contemplated action and affording to it reasonable opportunity to introduce evidence and to be heard thereon, fixing a temporary schedule of rates, which order shall be forthwith binding upon such public utility. But the Commission's power to order reductions in rates and charges of any public utility by means of such a temporary order, is limited to reductions which will absorb not more than the amount found by the Commission to be in excess of the amount of income, as determined by the Commission, necessary to provide a reasonable return on the value of the property of such public utility as found by the Commission as aforesaid.

Section 56-243 provides that:

§ 56-243. Duration of such temporary reduction.—No temporary order made under the preceding section (§ 56-242) shall remain in force or effect for a longer period than nine months from its effective date, and a further period not to exceed three months in addition if so ordered by the Commission.

Section 56-244 provides that:

§ 56-244. Increase to make up for losses due to excessive temporary reduction.—If upon a final disposition of the issues involved in a proceeding mentioned in § 56-242, the rates or charges as finally determined by the Commission, or the court having jurisdiction of the subject matter, are in excess of the rates and charges prescribed in any temporary order issued in such proceeding, then such public

utility shall be permitted, over such reasonable time as the Commission shall fix, to amortize and recover, by means of a temporary increase over and above the rates and charges finally determined, such sum as shall represent the difference between the gross income obtained from the rates and charges prescribed in such temporary reduction order, and the gross income which would have obtained, during the period such temporary reduction order was in effect, based upon the same volume, from the rates and charges finally determined.

Section 56-245 provides that:

§ 56-245. Temporary increase in rates.—Whenever the Commission, upon petition of any public utility, is of the opinion and so finds, after an examination of the reports, annual or otherwise, filed with the Commission by such public utility, together with any other facts or information which the Commission may acquire or receive from an investigation of the books, records or papers, or from an inspection of the property of such public utility, or upon evidence introduced by such public utility, that an emergency exists, and is of the opinion and so finds that a hearing to determine all of the issues involved in the final determination of the rates of service will require more than ninety days of elapsed time, the Commission may, in case of such emergency, enter a temporary order fixing a temporary schedule of rates, which order shall be forthwith binding upon such utility and its customers; provided, however, that when the Commission orders an increase in rates or charges of any public utility by means of such temporary order, it shall require such utility to enter into bond in such amount and with such security as the Commission shall approve, payable to the Commonwealth, and conditioned to insure prompt refund by such public utility, to those entitled thereto, of all amounts which such public utility shall collect or receive in excess of such rates and charges as may be finally fixed and determined by the Commission; and provided, further, however, that no such temporary order shall remain in force or effect for a longer period than nine months from its effective date, and a further period not to exceed three months in addition if so ordered by the Commission.

Section 56-247 provides that:

§ 56-247. Commission may change regulations, measurements, practices, services, or acts.—If upon investigation it shall be found that any regulation, measurement, practice, act or service of any public utility complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of law or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the Commission may substitute therefor such other regulations, measurements, practices, service or acts and make such order respecting, and such changes in, such regulations, measurements, practices, service or acts as shall be just and reasonable.

The Commission shall investigate the promotional allowances and practices of public utilities and shall take such action as such investigation may indicate to be in the public interest.

Section 56-249 provides that:

§ 56-249. Reports by utilities.—The Commission, with or without an investigation, may require any public utility to furnish to it in such form, at such times, and in such detail as the Commission shall require, such accounts, reports and other information of whatsoever kind or character as it may deem proper and in such form and detail as it may prescribe, in order to show completely the entire operation of the public utility in furnishing the unit of its product or service to the public.

Section 56-478.1 provides that:

§ 56-478.1. Requiring extension of telephone facilities into rural areas.—If, from any rural territory not now being served, application be made to the Commission by a group of ten or more persons, natural or artificial, to require an extension of telephone service to such territory, the Commission shall, if necessary to accomplish the purposes sought, fix a time for hearing said application on such terms and conditions as the Commission may prescribe and, if it be established to the satisfaction of the Commission, that a proper guaranteed revenue will accrue to any company

which may be required to extend such services to such territory, then the Commission is hereby authorized and empowered to require the telephone company located nearest, or most advantageous to, such territory to construct such extension to such point or points in such territory and to furnish adequate telephone facilities and conveniences to such customer or customers therein as in its judgment is right and proper.

Section 56-479 provides that:

§ 56-479. Commission to make rules; require connection between companies; inspect lines and buildings.—The Commission shall keep itself fully informed of the condition of all the telephone companies of this State as to the manner in which they are operated with reference to the accommodation of the public and shall, from time to time, make and enforce such requirements, rules and regulations as in its judgment will promote the efficiency of the service to be rendered, and to that end may require physical connection to be made between two or more lines at such place and in such manner as in its judgment the public service requires, having due regard to the interest of the companies to be affected thereby, as well as the effect upon their ability to render the best service to the public. The Commission may inspect and regulate the character of lines, buildings and other equipment used in the reception and transmission of messages, and may prohibit the paralleling of the lines of one company by those of another if in its judgment the efficiency of the service by either company or the public convenience will be injuriously affected.

Section 56-480 provides that:

§ 56-480. Rates, etc., on file with Commission not to be questioned in courts; revision; proof.—The reasonableness, justice and validity of any rate, charge, rule, regulation or requirement on file with the Commission for any telephone company shall not be questioned in any suit brought by any person in the courts of this State against any such telephone company, wherein is involved the charges of such company for the transmission of messages, or the efficiency of the public service and in all the courts of this State they shall be conclusively presumed to be reasonable, just and valid.

All such schedules, rules, regulations and requirements shall be received and held in all such suits as prima facie the schedules, rules, regulations and requirements of the Commission without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the Commission that the same is a true copy of the schedule, rule, regulation or requirement on file with the Commission and so offered in evidence.

Section 56-481 provides that:

§ 56-481. Rates established by municipal corporations subject to revision by Commission.—Upon complaint by anyone aggrieved that any rate, charge or practice of any telephone company doing business in this State, established or provided for by any municipal ordinance, franchise or other contract, is unreasonable, unjust, insufficient or discriminatory, the Commission shall order a hearing, and if, upon such hearing, it shall find that such complaint is well founded, the Commission shall prescribe and enforce just and reasonable rates, charges, or regulations, in lieu of those complained of.

Section 56-482 provides that:

§ 56-482. Agreements between telephone companies to be submitted to Commission.—Upon demand of either party thereto or any person affected thereby all arrangements and agreements whatever between two or more telephone companies doing business in this State, affecting or regulating the division of charges, earnings, or the manner of transmission of messages over their respective lines, or the physical connection between the lines of such companies, shall be submitted to the Commission for inspection insofar as they may affect the efficiency of the public service and the ability of the respective companies to best serve the public and be subject to its approval.



## **APPENDIX F**



**Part 68 of the FCC Rules**

(As amended February 13, 1976, March 12, 1976, March 18, 1976, and July 12, 1976)

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**SUBPART A—GENERAL****Section 68.1 *Purpose***

The purpose of the rules and regulations in this Part is to provide for uniform standards for the protection of the telephone network from harms caused by the connection of terminal equipment thereto.

**Section 68.2 *Scope***

- (a) Except as provided for in paragraphs (b) and (c), the rules and regulations in this Part apply to the direct connection after May 1, 1976 of all terminal equipment other than coin telephones, and PBX and key telephone equipment to the telephone network, for use in conjunction with all services other than party line service, and to the direct connection after August 1, 1976 of all terminal equipment other than coin telephones to the telephone network, for use in conjunction with all services other than party line service.
- (b) Unless otherwise ordered by the Commission, all items of equipment, other than PBX and key telephone equipment, of a type directly connected to the network as of May 1, 1976 may be connected thereafter up to January 1, 1977—and may remain connected for life—without registration, unless subsequently modified.
- (c) Unless otherwise ordered by the Commission, all PBX and key telephone equipment of a type directly connected to the network as of August 1, 1976 may be connected thereafter up to January 1, 1977—and may remain connected for life—without registration, unless subsequently modified.

**Section 68.3 *Definitions***

As used in this part:

**Direct Connection:** Connection of terminal equipment to

the telephone network by means other than acoustic and/or inductive coupling.

**Harm:** Electrical hazards to telephone company personnel, damage to telephone company equipment, malfunction of telephone company billing equipment, and degradation of service to persons other than the user of the subject terminal equipment, his calling or called party.

**Interface:** The point of interconnection between terminal equipment and telephone company communication facilities.

**Longitudinal Voltage:** One half the sum of the potential difference between the tip connection and earth ground, and the ring connection and earth ground.

**Loop Simulator Circuit:** A source of dc power and a load impedance for connection, in lieu of a telephone loop, to terminal equipment during testing. Figure 68.3 is a schematic drawing of the loop simulator. When used, the simulator shall be operated over the entire range of loop resistance as is indicated on the Figure, and with the indicated polarities and voltage limits. Whenever loop current is changed, sufficient time shall be allocated for the current to reach a steady-state condition before continuing testing.

**Metallic Voltage:** The potential difference between the tip and ring connections.

**Multi-Port Equipment:** Equipment that has more than one telephone connection with provisions internal to the equipment for establishing transmission paths among two or more telephone connections.

**One-Port Equipment:** Equipment which has either exactly one telephone connection, or a multiplicity of telephone connections arranged so that no transmission among such telephone connections, within the equipment is intended.

**Power Connections:** The connections between commercial power and any transformer, power supply rectifier, converter or other circuitry associated with registered terminal equipment or registered protective circuitry. The following are not power connections:

(a) connections between registered terminal equipment or registered protective circuitry and sources of non-hazardous voltages.

(b) conductors which distribute any power within registered terminal equipment or within registered protective circuitry.

(c) green wire ground (the grounded conductor commercial power circuit which is UL-identified by a continuous green color).

**Registered Protective Circuitry:** Separate, identifiable and discrete electrical circuitry designed to protect the telephone network from harm, which is registered in accordance with the rules and regulations in Subpart C of this part.

**Registered Terminal Equipment:** Terminal equipment which is registered in accordance with the rules and regulations in Subpart C of this part.

**Telephone Connection:** Connection to telephone tip and ring and all connections derived from telephone tip and ring. The term "derived" as used here means that the connections are not separated from telephone tip and ring by a sufficiently protective dielectric barrier.

**Telephone Network:** The public switched telephone network.

[Figure 68.3 Is Omitted in This Appendix]

**SUBPART B—CONDITIONS ON USE OF TERMINAL EQUIPMENT****Section 68.100 *General***

Terminal equipment may be directly connected to the telephone network in accordance with the rules and regulations in Subpart B of this Part.

**Section 68.102 *Registration Requirement***

Terminal equipment must be registered in accordance with the rules and regulations in Subpart C of this Part, or connected through registered protective circuitry, which is registered in accordance with the rules and regulations in Subpart C of this Part.

**Section 68.104 *Means of Connection*****(a) *General***

Except for telephone company-provided ringers and except as provided in subsection (c), all connections to the telephone network shall be made through the standard plugs and standard telephone company-provided jacks, or equivalent, described in Subpart F, in such a manner as to allow for easy and immediate disconnection of the terminal equipment. Standard jacks shall be so arranged that, if the plug connected thereto is withdrawn, no interference to the operation of equipment at the customer's premises which remains connected to the telephone network, shall occur by reason of such withdrawal.

**(b) *Data Equipment***

Where a customer desires to connect data equipment which has been registered in accordance with Section 68.308(a)(4)(i) or (ii), he shall notify the telephone company of each telephone line to which he intends to connect such equipment. The telephone company,

after determining the attenuation of each such telephone line between the interface and the telephone company central office, will make such connections as are necessary in each standard data jack which it will install, so as to allow the maximum signal power delivered by such data equipment to the telephone company central office to reach but not exceed the maximum allowable signal power permitted at the telephone company central office.

(c) [Reserved]

#### Section 68.106 *Notification to Telephone Company*

Customers connecting terminal equipment to the telephone network shall, before such connection is made, give notice to the telephone company of the particular line(s) to which such connection is to be made and shall provide to the telephone company the F.C.C. Registration Number and the Ringer Equivalence Number of the registered terminal equipment or registered protective circuitry.

#### Section 68.108 *Incidence of Harm*

Should terminal equipment cause harm to the telephone network, the telephone company shall, where practicable, notify the customer that temporary discontinuance of service may be required; however, where prior notice is not practicable, the telephone company may temporarily discontinue service forthwith, if such action is reasonable in the circumstances. In case of such temporary discontinuance, the telephone company shall (1) promptly notify the customer of such temporary discontinuance, (2) afford the customer the opportunity to correct the situation which gave rise to the temporary discontinuance, and (3) inform the customer of his right to bring a complaint to the Commission pursuant to the procedures set out in Subpart E of this Part.

**Section 68.110** *Compatibility of the Telephone Network and Terminal Equipment*

**(a)** *Availability of Interface Information*

Technical information concerning interface parameters not specified in this Part, including the number of ringers which may be connected to a particular telephone line, which is needed to permit terminal equipment to operate in a manner compatible with telephone company communications facilities, shall be provided by the telephone company upon request.

**(b)** *Changes in Telephone Company Facilities, Equipment, Operations or Procedures*

The telephone company may make changes in its communications facilities, equipment, operations or procedures, where such action is reasonably required in the operation of its business and is not inconsistent with the rules and regulations in this Part. If such changes can be reasonably expected to render any customer's terminal equipment incompatible with telephone company communications facilities, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service.

**SUBPART C—REGISTRATION PROCEDURES**

**Section 68.200** *Application for Equipment Registration*

An original and two copies of an application for registration of terminal equipment and protective circuitry shall be submitted on FCC Form 730 to the Federal Communications Commission, Washington, D.C. 20554. An application for original approval of an equipment type directly con-

nected to the network on May 1, 1976 may be submitted as a short form application (unless the Commission specifically requests the filing of complete information). All other applications shall have all questions on the form answered and include the following information:

- (a) Identification, technical description and purpose of the equipment for which registration is sought.
- (b) The means, if any, employed to limit signal power into interface.
- (c) A description of all circuitry employed in assuring compliance with Part 68 including the following:
  - (1) Specifications, including voltage or current ratings, of all circuit elements, whether active or passive, in that part of the device which provides the isolation means at the interface.
  - (2) A circuit diagram containing the complete circuit of that part of the device which provides the isolation means at the interface. If this portion of the device is subject to factory or field adjustment by the manufacturer's service agency, instructions for these adjustments shall be included. In addition, if the device is designed to operate from power supplied by electric utility lines, the circuit diagram shall also include that portion of the device connected to such lines, including the power supply to the internal circuits and whatever means are employed to isolate such utility lines, from the internal circuits.
  - (3) If a service manual is submitted, and any of these items are covered therein, it will be sufficient to list the pages in the manual on which the information specified in the item(s) appear.
- (d) A statement that the terminal equipment or protective circuitry complies with and will continue to com-

ply with the rules and regulations in Subpart D of this Part, accompanied by such test results, description of test procedures, analyses, evaluations, quality control standards and quality assurance standards as are necessary to demonstrate that such terminal equipment or protective circuitry complies with and will continue to comply with all the rules and regulations in Subpart D of this Part. The Office of Chief Engineer may issue an OCE Bulletin describing acceptable test methods; other test methods may be employed provided they are fully described in the application and are found acceptable by the Commission.

- (e) A photograph, sample, or drawing of the equipment label showing the information to be placed thereon.
- (f) Photographs, 8" x 10" of the equipment of sufficient clarity to reveal equipment construction and layout and labels for controls, with sufficient views of the internal construction to define component placement and chassis assembly. Photographs smaller than 8" x 10" will be acceptable if mounted on paper 8" x 10" and of sufficient clarity for the purpose. Insofar as these requirements are met by photographs or drawings contained in service manual or instruction manual included with the application, additional photographs are required only to complete the required showing.
- (g) If the device covered by the application is designed to operate in conjunction with other terminal devices, to couple their signals from or to the interface, the application shall list the class(es) of such other devices, together with their pertinent specification details.

**Section 68.202 *Public Notice***

- (a) The Commission will issue public notices of the filing of applications for equipment registration and the grants thereof. No grant will issue before 20 days from the date of the public notice of the filing of the application.
- (b) The Commission will maintain lists of equipment for which it has granted registration and for which it has revoked registration.

**Section 68.204 *Comments and Replies***

Comments may be filed as to any application for equipment registration within 20 days of the date of the public notice of its filing. Replies to such comments may be filed within 10 days of the date of filing of such comments. All comments must be served on the applicant and all replies must be served on all parties filing comments. An original and three copies of all comments and replies must be filed.

**Section 68.206 *Grant of Application***

- (a) The Commission will grant an application for equipment registration if it finds from an examination of such application and other matter which it may officially notice, that the equipment will comply with the rules and regulations in Subpart D of this Part, or that such grant will otherwise serve the public interest.
- (b) Grants will be made in writing showing the effective date of the grant and any special condition(s) attaching to the grant.
- (c) Equipment registration shall not attach to any equipment, nor shall any equipment registration be deemed effective, until the application has been granted.

**Section 68.208 *Dismissal and Return of Application***

- (a) An application which is not filed in accordance with the requirements of this Part or which is defective with respect to completeness of answers to questions, execution or other matters of a formal character, may not be accepted for filing by the Commission and may be returned as unacceptable for filing unless accompanied by a fully supported request for waiver.
- (b) Any application, upon written request, may be dismissed prior to a determination granting or denying the equipment registration requested.
- (c) If an applicant is requested by the Commission to furnish any additional documents, information or equipment not specifically required by this Subpart, a failure to comply with the request within the time, if any, specified by the Commission will result in the dismissal of such application.

**Section 68.210 *Denial of Application***

If the Commission is unable to make the finding specified in Section 68.206 it will deny the application. Notification of the denial will include a statement of the reasons for the denial.

**Section 68.212 *Assignment of Equipment Registration***

Commission equipment registration may not be assigned, exchanged or in any other way transferred to another party, without prior written notice to the Commission.

**Section 68.214 *Changes in Registered Terminal Equipment and Registered Protective Circuitry***

No changes in registered terminal equipment and registered protective circuitry shall be made without prior written notice to the Commission. If such change in registered termi-

nal equipment or registered protective circuitry results in any change in the information furnished the Commission pursuant to Section 68.200, the grantee shall submit a revised application for equipment registration in accordance with Section 68.200.

**Section 68.216 *Repair of Registered Terminal Equipment and Registered Protective Circuitry***

Repair of registered terminal equipment and registered protective circuitry shall be accomplished only by the manufacturer or assembler thereof or by their authorized agent; however, routine repairs may be performed by a user, in accordance with the instruction manual if the applicant certifies that such routine repairs will not result in noncompliance with the rules and regulations in Subpart D of this Part.

**Section 68.218 *Responsibility of Grantee of Equipment Registration***

- (a) In applying for a grant of an equipment registration, the grantee warrants that each unit of equipment marketed under such grant will comply with all the applicable rules and regulations in Subpart D of this Part.
- (b) The grantee or its agent shall provide to the user of the registered equipment the following:
  - (1) Instructions concerning installation, operational and repair procedures, where applicable.
  - (2) Instructions that registered terminal equipment or protective circuitry may not be used with party lines or coin lines.
  - (3) Instructions that when trouble is experienced the customer shall disconnect the registered equipment from the telephone line to determine

if the registered equipment is malfunctioning and that if the registered equipment is determined to be malfunctioning, the use of such equipment shall be discontinued until the problem has been corrected.

- (4) Instructions that the user must give notice to the telephone company in accordance with the requirements of Section 68.106.
- (c) When registration is revoked for any item of equipment, the grantee is responsible to take all reasonable steps to ensure that purchasers and users of such equipment are notified of such revocation and are notified to discontinue use of such equipment.

#### Section 68.220 *Cross Reference*

Applications for registration of terminal equipment shall, in addition to the requirements of this Subpart, comply with the provisions of Subpart L of Part 2 of this Chapter.

Subpart D is amended as follows:

#### SUBPART D—CONDITIONS FOR REGISTRATION

#### Section 68.300 *Labelling Requirements*

- (a) Registered terminal equipment and registered protective circuitry shall have prominently displayed on an outside surface the following information in the following format:

<p>Complies With Part 68, FCC Rules  FCC Registration Number .....  Ringer Equivalence .....</p>
--

- (b) Registered terminal equipment and registered protective circuitry shall also have the following identifying information permanently affixed thereto:
  - (1) Grantee's name

- (2) Model number, as specified in the registration application
- (3) Serial number or date of manufacture

#### Section 68.302 *Environment Simulation*

Registered terminal equipment and registered protective circuitry shall comply with all the criteria contained in the rules and regulations in this Subpart, both prior to and after the application of each of the mechanical and electrical stresses specified in this section, notwithstanding that certain of these stresses may result in partial or total destruction of equipment.

##### (a) Vibration

The equipment shall be subjected to vibration while in the condition that it is normally shipped or transported. That is, during the following vibration test the equipment shall be vibrated while packaged if shipped packaged, or the equipment shall be vibrated while unpackaged if shipped unpackaged.

The following sinusoidal vibration shall be applied once in each of three orthogonal directions, however, for large equipments, the unit should rest on the base or side on which it is normally shipped: One sweep at a level of 0.5g peak from 5 to 100 Hz, and one sweep at a level of 1.5g peak from 100 to 500 Hz. The 5 to 100 Hz sweep should be conducted at a sweep rate of 0.1 octave/min. (approximately 45 minutes) and the 100 to 500 Hz sweep at a rate of 0.25 octave/min. (approximately 10 minutes).

##### (b) Temperature and Humidity

Cycling at any convenient rate through the following temperature and humidity conditions three times: 30 minutes at 150°F and 15 percent relative humidity, followed by 30 minutes at 90°F and 90 percent rela-

tive humidity, followed by 30 minutes at  $-40^{\circ}\text{F}$  and any convenient humidity.

(c) Shock:

(1) Registered Terminal Equipment and Registered Protective Circuitry Packaged for Shipment:

These tests are to be performed on a concrete surface with one package and its normal contents. If after six or more successive drops a package has sustained visible damage, the equipment under test may be repackaged before the packaged drop tests are resumed.

0-20 lbs:

One 30-inch face drop on each face and one 30-inch corner drop on each corner.

20-50 lbs:

One 24-inch face drop on each face and one 24-inch corner drop on each corner.

50-100 lbs:

One 21-inch face drop on each face and one 21-inch corner drop on each corner.

100-200 lbs:

One 18-inch face drop on each normal or designated rest face. One edgewise drop and one cornerwise drop from a height of 18 inches on each edge and corner adjacent to the rest face.

200-600 lbs:

One 12-inch face drop on each normal or designated rest face. One edgewise drop and one cornerwise drop from a height of 12 inches on each edge and corner adjacent to the rest face.

**600-1000 lbs:**

One 8-inch face drop on each normal or designated rest face. One edgewise drop and one cornerwise drop from a height of 8 inches on each edge and corner adjacent to the rest face.

**Over 1000 lbs:**

One 6-inch face drop on each normal or designated rest face. One edgewise drop from a height of 6 inches on each edge adjacent to the rest face.

**(2) Registered Terminal Equipment and Registered Protective Circuitry Equipment Unpackaged:**

**Hand-Held Items Normally Used at Head Height:**

18 random drops from a height of 60 inches onto concrete covered with  $\frac{1}{8}$  inch asphalt tile or similar surface.

**Normally Customer Carried Equipment:**

6 random drops from a height of 30 inches onto concrete covered with  $\frac{1}{8}$  inch asphalt tile or similar surface.

**Equipment Not Normally Customer Carried:**

These tests are made onto concrete covered with  $\frac{1}{8}$  inch asphalt tile or similar surface.

**0-20 lbs:**

One 6-inch face drop on each normal or designated rest face, one 3-inch drop on all other faces, and one 3-inch corner drop on each corner.

20-50 lbs:

One 4-inch face drop on each normal or designated rest face, one 2-inch face drop on all other faces, and one 2-inch corner drop on each corner.

50-100 lbs:

One 2-inch face drop on each normal or designated rest face. One edgewise drop and one cornerwise drop from a height of 2 inches on each edge and corner adjacent to the rest face.

100-1000 lbs:

One 1-inch face drop on each normal or designated rest face. One edgewise drop and one cornerwise drop from a height of 1 inch on each edge and corner adjacent to the rest face.

Over 1000 lbs:

One 1-inch face drop on each normal or designated rest face. One edgewise drop from a height of 1 inch on each edge adjacent to this rest face.

- (3) The drop tests specified in the mechanical shock conditioning stresses shall be performed as follows:

#### FACE DROP

The unit should be dropped such that the face to be struck is approximately parallel to the impact surface.

#### CORNER DROP

The unit should be dropped such that upon impact a line from the struck corner to the center of gravity of the packaged equipment is approximately perpendicular to the impact surface.

### EDGEWISE DROP

The unit should be positioned on a flat test surface. One edge of the rest face should be supported with a block so that the rest face makes an angle of  $20^\circ$  with the horizontal. The opposite edge should be lifted the designated height above the test surface and dropped.

### CORNERWISE DROP

The unit should be positioned on a flat test surface. One corner of the test face should be supported with a block so that the rest face makes an angle of  $20^\circ$  with the horizontal. The opposite corner should be lifted the designated height above the test surface and dropped.

### RANDOM DROP

The unit should be positioned prior to release to ensure as nearly as possible that for every six drops there is one impact on each of the six major surfaces and that the surface to be struck is approximately parallel to the impact surface.

#### (d) Metallic voltage surge

Two 800-volt peak surges of a metallic voltage (one of each polarity) having a 10-microsecond *maximum* rise time to crest and 560-microsecond *minimum* decay time to half crest applied between tip and ring and between any other pair of connections on which lightning surges may occur (with one of the connections of the pair under test grounded) with the equipment in each of the following states:

- (1) any operational state which can affect compliance with the requirements of Part 68;
- (2) any state in which the equipment might be connected to the telephone network and from which

it is capable of transferring to an operational state by an automatic or manual action required for proper use of the equipment and provided that any such state can affect compliance with the requirements of Part 68; and

- (3) any state in which the equipment might be connected to the telephone network through an automatic or manual action under all reasonably foreseeable possibilities of disconnection of connections of such equipment with primary commercial power sources (including possible loss of equipment grounding through disconnection of a third-wire ground connection contained in a primary power source plug).

During application of the surges, equipment states which cannot be achieved by normal means of power shall be achieved artificially by appropriate means, if necessary to comply with the above requirements. The peak current drawn from the surge generator must not be limited to less than 100 amperes by the capabilities of the surge generator.

(e) Longitudinal voltage surge

With registered terminal equipment and registered protective circuitry in each of the following states: *first*, any operational state which can affect compliance with the requirements of Part 68; *second*, any state in which the equipment might be connected to the telephone network and from which it is capable of transferring to an operational state by an automatic or manual action required for proper use of the equipment and provided that any such state can affect compliance with the requirements of Part 68; and *third*, any state in which the equipment might be connected to the telephone network through an auto-

matic or manual action under all reasonably foreseeable possibilities of disconnection of connections of such equipment with primary commercial power sources (including possible loss of equipment grounding through disconnection of a third-wire ground connection contained in a primary power source plug):

- (1) Two 1500 volt peak surges (one of each polarity) having a 10 microsecond *maximum* rise time to crest and a 160 microsecond *minimum* decay time to half crest applied between tip and ring connected together, and individually to (i) and (ii) below:
  - (i) earth ground; and
  - (ii) all leads on the registered equipment intended for connection to non-registered equipment when these leads are connected together.

The peak current drawn from the surge generator must not be limited to less than 200 amperes by the capabilities of the surge generator.

- (2) Two 1500 volt peak surges (one of each polarity) having a 10 microsecond *maximum* rise time to crest and a 160 microsecond *minimum* decay time to half crest applied between pairs of connections other than tip and ring on which lightning surges may occur, connected together, and individually to (i) and (ii) below:
  - (i) earth ground; and
  - (ii) all leads on the registered equipment intended for connection to non-registered equipment when these leads are tied together.

The peak current drawn from the surge generator shall not be limited to less than 200 amperes by the capabilities of the surge generator.

- (3) Six 2500 volt peak surges (three of each polarity) having a 2 microsecond *maximum* rise time to crest and a 10 microsecond *minimum* decay time to half crest applied between the phase and neutral terminals of the ac power line. The peak current drawn from the surge generator must not be limited to less than 1000 amperes by the capabilities of the surge generator.

#### Section 68.304 *Leakage Current Limitations*

Registered terminal equipment and registered protective circuitry shall assure that, if a voltage source is connected to the combinations listed in the table below, of the following points on such equipment:

- (1) all telephone connections,
- (2) all power connections,
- (3) all possible combinations of exposed conductive surfaces on the exterior of such equipment or circuitry excluding terminals for connection to other terminal equipment,
- (4) all terminals for connection to nonregistered equipment, and
- (5) points having a conducting path to the secondaries of any power supply

and is gradually increased, from zero to the values listed in the table below, over a thirty second time period, and then applied continuously for one minute, the current in the mesh formed by the voltage source and these points shall not exceed 10 milliamperes peak at any time during this 90 second time interval.

*Voltages Applied for Various  
Combinations of Electrical Connections*

<u>Voltage Source Connected Between</u>	<u>Value to which test voltages is gradually increased, rms, 60 Hertz</u>
(1) and (3)	1000
(1) and (4)	1000
(2) and (3)	1500
(2) and (4)	1500
(2) and (5)	1500

**Section 68.306 *Hazardous Voltage Limitations***

**(a) General**

Under no condition of failure of registered terminal equipment or registered protective circuitry, or of equipment connected thereto, which can be conceived to occur in the handling, operation or repair of such equipment or circuitry, shall the open circuit voltage on telephone connections exceed 70 volts peak for more than one second, except for voltages for network control signaling and supervision, which, in any case, should be consistent with standards employed by the telephone companies.

**(b) Connection of Non-Registered Equipment to Registered Terminal Equipment or Registered Protective Circuitry**

**(1) General**

Leads to, or any elements having a conducting path to telephone connections shall be reasonably physically separated and restrained from; not routed in the same cable as; nor use the same connector as leads or metallic paths connecting to either power connections or to non-registered equipment.

(2) Connections to Registered Terminal Equipment

The voltage measurable between tip and ring, tip and ground, and ring and ground shall not exceed 70 volts peak for more than one second, as measured across the telephone connections terminated with 1500 ohms, tip to ring, center-tapped through 1000 ohms to ground, if 120 volts rms 60Hz ac is applied between all connections to other equipment tied together (except connections to non-hazardous voltage sources) and ground.

(3) Connections to Registered Protective Circuitry

The voltage measurable between tip and ring, tip and ground, and ring and ground shall not exceed 70 volts peak for more than one second, as measured across the telephone connections terminated with 1500 ohms, tip to ring, center-tapped through 1000 ohms to ground, if either 120 or 300 volts rms 60Hz ac is applied (i) between all protective circuitry connections other than telephone connections (and connections to non-hazardous voltage sources) tied together and ground, and (ii) across all protective circuitry connections other than telephone connections (and connections to non-hazardous voltage sources) which have a transmission path to the telephone connections, with alternate leads grounded, under all reasonable applications of earth ground to the protective circuitry.

(4) Non-hazardous Voltage Source

A voltage source is considered a non-hazardous voltage source if it conforms with the requirements of Sections 68.302, 68.304, and 68.306(b) (1), with all connections to the source other

than primary power connections treated as "telephone connections," and if such source supplies voltages no greater than the following under all modes of operation and of failure:

- (i) ac voltages less than 42 volts peak;
- (ii) dc voltages less than 80 volts; and
- (iii) combined ac and dc voltages with the dc component between 21 and 80 volts, ac voltages less than  $(55 - 0.6 \times V_{dc})$  peak.

#### Section 68.308 *Signal Power Limitations*

##### (a) *Voiceband Metallic Signal Power*

- (1) *Limitations on internal signal sources not intended for network control signaling contained in voice equipment.* For all operating conditions of registered terminal equipment and registered protective circuitry, the maximum power of other than live voice signals delivered to a loop simulator circuit shall not exceed -9 dB with respect to one milliwatt, when averaged over any 3-second interval.
- (2) *Limitations on internal signal sources primarily intended for network control signalling contained in voice and data equipment.* For all operating conditions of registered terminal equipment and registered protective circuitry, the maximum power delivered to a loop simulator circuit shall not exceed one milliwatt when averaged over any 3-second interval, during normal usage.
- (3) *One port terminal equipment with provision for through transmission from other equipment, excluding data protective circuitry.* Registered

terminal equipment and registered protective circuitry shall have no adjustments that will allow net amplification to occur in the through-transmission path within the frequency range of 200 to 4000 Hertz, when measured from a 600 ohm source into a loop simulator circuit. The net gain of such equipment shall be designed so as not to exceed 0 dB; however, the gain for any single unit of registered terminal equipment or registered protective circuitry may exceed 0 dB by as much as 1.5 dB *provided that* the net gain, averaged over all such units, is no greater than 0 dB.

- (4) *Data equipment.* For data applications, registered terminal equipment and registered protective circuitry in all operating conditions (other than (2) above) shall meet one of the following limits, depending upon the type of telephone interface. The transmitted data signal power, averaged over any 3-second time interval, delivered to a loop simulator circuit, shall not exceed:
- (i) A maximum level adjustable to no greater than -4 dB with respect to one milliwatt, for connection to a telephone company provided data jack. (Fixed loss loop method.)
  - (ii) A maximum level set by means of connection in a telephone company-provided data jack, which level can be programmed in 1 dB steps from -12 dB to -3 dB with respect to one milliwatt. (Programmed method.)
  - (iii) A nonadjustable level no greater than -9 dB with respect to one milliwatt for connection to a standard telephone jack.

The maximum signal power specified in (i) and (ii) above may exceed the specified maximum level by as much as 1.0 dB, *provided that* the power, averaged over all units of the equipment complies with the specified maximum. However, in order to protect against excessive signal power on loops with low insertion loss, no manufacturing tolerance is allowed which would permit the -9 dB with respect to one milliwatt maximum specified in (iii) above to be exceeded by any units.

(b) **Metallic Signal Power at Frequencies Above Voice-band**

(1) *Frequency band 3995-4005 Hertz.*

- (i) *Power resulting from internal signal sources contained in registered protective circuitry and registered terminal equipment (voice and data), not intended for network control signaling.* For all operating conditions of registered terminal equipment and registered protective circuitry which incorporate signal sources other than sources intended for network control signaling, the maximum power delivered by such sources in the 3995-4005 Hertz band to a loop simulator circuit, shall be 18 dB below the maximum permitted power specified in (a) above, for the 200-400 Hertz band.
- (ii) *Terminal equipment with provision for through transmission from other equipments.* The loss in any through transmission path of registered terminal equipment and registered protective circuitry at any

frequency in the 600 to 4000 Hertz band shall not exceed, by more than 3 dB, the loss at any frequency, in the 3995 to 4005 Hertz band, when measured into a loop simulator circuit from a source which appears as 600 ohms across tip and ring.

(2) *Frequencies above 4005 Hertz.*

- (i) Registered terminal equipment and registered protective circuitry with internal signal sources not intended for network control signaling shall not exceed the following limitations at the maximum transmitted power level.
- (ii) Registered terminal equipment and registered protective circuitry with provision for through transmission from other equipments shall not exceed the following limitations, with a 1000 Hertz tone applied from a 600 ohm source (or, if appropriate, a source which reflects a 600 ohm impedance across tip and ring) at the maximum level that would be applied during normal operation. Registered protective circuitry for data shall also comply with the tone level 10 dB higher than that expected during normal operation.
- (iii) Voice terminal equipment containing electro-acoustic transducers for live voice input, including recording devices, shall not exceed the following limitations, with a 1000 Hertz acoustic signal applied to the electro-acoustic transducers that results in a power delivered into the 600 ohm load impedance of -13 dB with respect to one milliwatt.

<u>Frequency Band</u>	<u>Limitations on Maximum Power (dB with respect to one milliwatt)</u>
4005 Hz to 10 kHz	-16
10 kHz to 25 kHz	-24
25 kHz to 40 kHz	-36
40 kHz to 1 MHz	-50

These limitations apply in all operating states of such equipment, except during network control signaling. In the off-hook state, they apply over the range of loop current that would flow with the equipment connected to a loop simulator circuit.

(c) Longitudinal Voltage Except During Network Control Signaling

At the telephone connections of registered terminal equipment and registered protective circuitry, the longitudinal voltage shall be less than the maximum voltages listed below when measured across the specified longitudinal termination and a 600 ohm metallic termination in the states and under the conditions specified in paragraph (b) above for metallic signal power above 4005 Hertz.

<u>Frequency Band</u>	<u>Maximum Voltage (dBV)*</u>	<u>Longitudinal Termination Impedance (ohms)</u>
100 Hz to 4 kHz	-53 (2.2 mV)	500
4 kHz to 10 kHz	-57 (1.4 mV)	500
10 kHz to 25 kHz	-62 (0.80 mV)	300
25 kHz to 40 kHz	-74 (0.20 mV)	200
40 kHz to 1 Mhz	-80 (0.10 mV)	200

(\* dBV is the voltage in decibels relative to 1 volt rma.)

In the 100 to 4000 Hertz band, the -53 dBV limit applies to the longitudinal voltage that is the resultant of all the component voltages in that band after they are weighted according to the curve in Figure 68.308. The weighting curve in Figure 68.308 has an absolute gain of unity at 4000 Hertz. A circuit which provides a longitudinal termination impedance of 500 ohms is depicted in Figure 68.310(f) in the Longitudinal Balance Limitations section of these Rules. The specific resistor values depicted therein should be appropriately changed to yield other Y-networks with a metallic termination of 600 ohms impedance and with the 200 and 300 ohm aggregate longitudinal termination impedances required in this section.

[Figure 68.308 Is Omitted In This Appendix]

#### Section 68.310 *Longitudinal Balance Limitations*

- (a) *Technical Description and Application.* The metallic-to-longitudinal balance coefficient,  $BALANCE_{m-l}$ , is expressed as:

$$BALANCE_{m-l} = 20 \log_{10} \left| \frac{e_m}{e_l} \right|$$

where  $e_l$  is the longitudinal voltage produced across a 500-ohm longitudinal termination and  $e_m$  is the metallic voltage across the tip-ring interface of the input port when a voltage (at any frequency  $200 < f < 4000$  Hertz) is applied from a balanced 600-ohm metallic source. The source voltage should be set such that  $e_m = 0.775$  volts rms (0 dBm) when a 600-ohm termination is substituted for the terminal equipment. The minimum balance coefficient shall be equalled or exceeded at all values of dc loop current that the port under test of the registered equipment

is capable of drawing when attached to the loop simulator circuit specified in these Rules. A test circuit that satisfies the above conditions and may be used for measuring the metallic-to-longitudinal balance coefficient is shown in Figure 68.310(a). The minimum balance requirements specified below shall be equalled or exceeded under all reasonable conditions of the application of earth ground to the registered equipment:

Sub-paragraph	Equipment state	Minimum balance requirement	Frequency range (Hertz)
(b)	Both on-hook and off-hook	60 dB	200 to 1000
		40 dB	1000 to 4000
(c)	on-hook	60 dB	200 to 1000
		40 dB	1000 to 4000
	off-hook	40 dB	200 to 4000
(d)	off-hook	40 dB	200 to 4000
(e) voice equipment	Both on-hook and off-hook	60 dB	200 to 1000
		40 dB	1000 to 4000
(e) data equipment	on-hook	60 dB	200 to 1000
		40 dB	1000 to 4000
	off-hook	40 dB	200 to 4000
(f)	off-hook	40 dB	200 to 4000
(g)	Both on-hook and off-hook	60 dB	200 to 1000
		40 dB	1000 to 4000
(h)	off-hook	40 dB	200 to 4000

- (b) *Registered One-Port Equipment for Loop-Start. Non-data applications.* The one-port shall be driven from a 600-ohm metallic source having a 500-ohm longitudinal impedance.

- (c) *Registered One-Port Equipment for Loop-Start Data applications.* The one-port shall be driven from a 600-ohm metallic source having a 500-ohm longitudinal impedance.
- (d) *Registered One-Port Equipment for Ground-Start applications.* The one-port shall be driven from a 600-ohm metallic source having a 500-ohm longitudinal impedance.
- (e) *Registered Protective Circuitry For Loop Start Applications.* These criteria shall be met with either terminal of the interface to other equipment connected to earth ground. The interface to other equipment shall be terminated in an impedance which will be reflected to the telephone connection as 600-ohms in the off-hook state of the registered protective circuit, and the interface should not be terminated in the on-hook state. Figure 68.310(e) shows the interface of the protective circuitry being tested and the required arrangement at the interface to other equipment.
- (f) *Registered Protective Circuitry for Ground-Start Applications.* These criteria shall be met with either terminal of the interface to other equipment connected to earth ground. The interface to other equipment shall be terminated in an impedance which will be reflected to the telephone connection as 600-ohms in the off-hook state of the registered protective circuit. Figure 68.310(e) shows the interface of the protective circuitry being tested and the required arrangement at the interface to other equipment.
- (g) *Registered Multi-Port Equipment for Loop Start Applications.* These criteria shall be satisfied for all ports when the ports are terminated in their appropriate networks for both their on-hook and off-hook states, as will be identified below, and when interface

connections other than the ports are terminated in circuits appropriate to that interface. The minimum balance coefficients shall also be satisfied for all values of dc loop current that the registered equipment is capable of drawing through each of its ports when these ports are attached to the loop simulator circuit specified in these Rules. The port under test shall be driven from a 600-ohm metallic source having a 500-ohm longitudinal impedance. The terminations for all ports other than the particular one whose balance coefficient is being measured shall have a metallic impedance of 600 ohms and a longitudinal impedance of 500 ohms in their off-hook states, and they shall be unterminated in their on-hook states. Figure 68.310(g) shows this termination.

- (h) *Registered Multi-Port Equipment for Ground Start Applications.* These criteria shall be satisfied for all ports when the ports are terminated in their appropriate networks for both their on-hook and off-hook states, as will be identified below, and when interface connections other than the ports are terminated in circuits appropriate to that interface. The minimum balance coefficients shall also be satisfied for all values of dc loop current that the registered equipment is capable of drawing through each of its ports when these ports are attached to the loop simulator circuit specified in these Rules. The port under test shall be driven from a 600-ohm metallic source having a 500-ohm longitudinal impedance. The terminations for all ports other than the particular one whose balance coefficient is being measured shall have a metallic impedance of 600 ohms and a longitudinal impedance of 500 ohms, in their off-hook states and they shall be unterminated in their on-hook states. Figure 68.310(g) shows this termination.

[Figures 68.310(a), (e) and (g) Are Omitted In  
This Appendix]

Section 68.312 *On-hook Impedance Limitations.*

- (a) Limitations on individual equipment intended for parallel operation on loop-start telephone facilities, other than PBX equipment:
- (1) Registered terminal equipment and registered protective circuitry shall conform to the following limitations, for each Ringing Type which is listed as part of its Ringer Equivalence:
    - (i) The dc resistance between tip and ring conductors, and between each of the tip and ring conductors and earth ground shall be greater than 10 megohms for applied dc voltages not exceeding 100 volts.
    - (ii) The dc resistance between tip and ring conductors, and between each of the tip and ring conductors and earth ground shall be greater than 30 kilohms for applied dc voltages between 100 and 200 volts.
    - (iii) During the application of simulated ringing, as listed in Table I below, the total dc current, as a result of non-sinusoidal ac wave characteristics, shall not exceed 3.0 milliamperes.
    - (iv) During the application of simulated ringing, as listed in Table I below, the impedance between the tip and ring conductors (defined as the quotient of applied ac voltage divided by resulting true rms current) shall be greater than the value specified in Table I. Except as provided in sub-section (2) below, such impedance shall be less than 40 kilohms.
    - (v) During the application of simulated ringing, as listed in Table I below, the im-

pedance between each of the tip and ring conductors and ground shall be greater than 100 kilohms.

- (2) Registered terminal equipment and registered protective circuitry intended for use on facilities which always will have additional ringing detection circuitry in use at the same time such registered terminal equipment and registered protective circuitry is connected need not comply with the 40 kilohm maximum impedance specification of sub-section (a)(1)(iv), above.
- (b) Ringer Equivalence definition. The values of each of the parameters for which a limitation is imposed in sub-section (a) above shall be determined for a representative unit under test. Quotients of each such value shall be formed in accordance with the following:
  - (1) 50 megohms divided by the minimum measured on-hook dc resistance for dc voltages not exceeding 100 volts.
  - (2) 150 kilohms divided by the minimum measured on-hook dc resistance for dc voltages between 100 and 200 volts.
  - (3) The maximum total dc current which flows during the application of simulated ringing, as a result of non-sinusoidal ac wave characteristics, as listed in Table I below, in milliamperes divided by 0.6 milliamperes.
  - (4) Five times the impedance limitation listed in Table I, below, divided by the minimum measured ac impedance, defined as in sub-section (a)(1)(iv) above, during the application of simulated ringing as listed in Table I.

The largest of the unitless quotients so formed followed by the Ringing Type letter indicator, representing the frequency range for which that number is valid, is the Ringer Equivalence. If Ringer Equivalence is to be stated for more than one Ringing Type, testing shall be performed at each frequency range to which Ringer Equivalence is to be determined in accordance with the above, and the largest resulting Ringer Equivalence number so determined will be associated with each Ringing Type letter designation for which it is valid.

[Table I Is Omitted In This Appendix]

Section 68.314 *Billing Protection.*

- (a) *Call duration requirements on data equipment.* Data registered protective circuitry and registered data terminal equipment shall assure:
  - (1) that an outgoing telephone call shall persist for at least two seconds after the call is answered at the called end of a connection originated by the equipment; and
  - (2) that when an incoming telephone call is answered by the equipment, on a connection not originated by the equipment, signals delivered to a loop simulator circuit, shall be limited to -55 dB with respect to one milliwatt, for at least two seconds after the (answering) equipment transfers from the on-hook to off-hook state.
- (b) *Voice and data equipment requirements.* Registered protective circuitry and registered terminal equipment shall comply with the following:
  - (1) In the on-hook state, power delivered into a loop simulator circuit shall not exceed -55 dB with

respect to one milliwatt within the frequency band of 200 to 4000 Hertz. Registered protective circuitry shall additionally assure that for any input power level up to 10 dB above the maximum level that is expected under normal operation, the power delivered into the loop simulator circuit in the on-hook state does not exceed the above limits.

- (2) The loop current through registered terminal equipment or registered protective circuitry, when connected to a loop simulator circuit with the 600-ohm resistor and 500 microfarad capacitor therein disconnected, shall, for a least 5 seconds after the equipment goes to the normal off-hook state which would occur in response to ringing (called party condition), not decrease by more than 25 percent from its maximum value attained during this 5-second interval, unless the equipment is returned to the on-hook state during the above 5-second interval.
- (3) Registered terminal equipment and registered protective circuitry shall not deliver signals into a loop simulator circuit from sources internal to the registered equipment with energy in the 2450 to 2750 Hertz band unless an at least equal amount of energy is present in the 800 to 2450 Hertz band.

## SUBPART E—COMPLAINT PROCEDURES

### Section 68.400 *Content*

A complaint shall be in writing and shall contain: (a) the name and address of the complainant, (b) the name (and address, if known) of the defendant against whom the complaint is made, (c) a complete statement of the facts, including supporting data, where available, showing that such

defendant did or omitted to do anything in contravention of Part 68 of the Commission's Rules, and (d) the relief sought.

Section 68.402 *Amended Complaints*

An amended complaint setting forth transactions, occurrences or events which have happened since the filing of the original complaint and which relate to the original cause of action may be filed with the Commission.

Section 68.404 *Number of Copies*

An original and two copies of all complaints and amended complaints shall be filed. An original and one copy of all other pleadings shall be filed.

Section 68.406 *Service*

- (a) The Commission will serve a copy of any complaint or amended complaint filed with it, together with a notice of the filing of the complaint. Such notice shall call upon the defendant to satisfy or answer the complaint in writing within the time specified in said notice of complaint.
- (b) All subsequent pleadings and briefs shall be served by the filing party on all other parties to the proceeding in accordance with the requirements of Section 1.47. Proof of such service shall also be made in accordance with the requirements of said section.

Section 68.408 *Answers to Complaints and Amended Complaints*

Any party upon whom a copy of a complaint or amended complaint is served under this subpart shall serve an answer within the time specified by the Commission in its notice of complaint. The answer shall advise the parties and the Commission fully and completely of the nature of the

defense, and shall respond specifically to all material allegations of the complaint. In cases involving allegations of harm, the answer shall indicate what action has been taken or is proposed to be taken to stop the occurrence of such harm, both in terms of future production and with reference to articles in the possession of distributors, sellers, and users. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Matters alleged as affirmative defenses shall be separately stated and numbered. Any defendant failing to file and serve an answer within the time and in the manner prescribed may be deemed in default.

*Section 68.410 Replies to Answers or Amended Answers*

Within 10 days after service of an answer or an amended answer, a complainant may serve a reply which shall be responsive to matters contained in such answer or amended answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegation contained in such answer or amended answer.

*Section 68.412 Defective Pleadings*

Any pleading filed in a complaint proceeding not in substantial conformity with the requirements of the applicable rules in this part may be dismissed.

[Subpart F, Consisting Primarily of Diagrams, Is Omitted  
From This Appendix]

No. 76-332

Supreme Court, U. S.

FILED

DEC 8 1976

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, CON-  
TINENTAL TELEPHONE CORPORATION, UNITED TELEPHONE  
COMPANY OF THE CAROLINAS and the UNITED STATES  
INDEPENDENT TELEPHONE ASSOCIATION, ET AL.,  
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED  
STATES OF AMERICA, ET AL.,  
*Respondents.*

On Petition for a Writ of Certiorari to The United States  
Court of Appeals for the Fourth Circuit

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IN THE  
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OCTOBER TERM, 1976

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No. 76-332

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AMERICAN TELEPHONE AND TELEGRAPH COMPANY, CON-  
TINENTAL TELEPHONE CORPORATION, UNITED TELEPHONE  
COMPANY OF THE CAROLINAS and the UNITED STATES  
INDEPENDENT TELEPHONE ASSOCIATION, ET AL.,  
*Petitioners,*

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FEDERAL COMMUNICATIONS COMMISSION and the UNITED  
STATES OF AMERICA, ET AL.,  
*Respondents.*

---

On Petition for a Writ of Certiorari to The United States  
Court of Appeals for the Fourth Circuit

---

**REPLY OF PETITIONERS**

---

This reply is submitted by petitioners in response to  
oppositions to certiorari filed by respondents ("FCC  
Br."), respondent-intervenors ("API Br."), and  
Aeronautical Radio *et al.* ("ARINC Br."). The op-  
positions provide no persuasive reason for denying

certiorari. Examination of their arguments and of other events since the petition was filed confirms the importance of the case and the presence of serious jurisdictional issues which have not been, but should be, resolved by this Court.

**I. Certiorari Is Supported by Requests of State Authorities, Continuing FCC Regulatory Measures, and Conflict in the Decisions.**

1. In urging certiorari, petitioners showed that this case presented the basic statutory question of regulatory jurisdiction over 100 million telephones and other pieces of terminal equipment; that it involved a direct and concrete clash between the FCC and state regulatory authorities; and that it has extremely important consequences for the provision and regulation of telephone service in the United States. None of these facts is disputed in the oppositions.

The importance of the case is further confirmed by additional requests that this Court grant certiorari. Independent certiorari petitions have now been filed by the National Association of Regulatory Utility Commissioners ("NARUC"), the quasi-governmental body including the public utility authorities in all 50 states,<sup>1</sup> and by the Southeastern Association of Regulatory Utility Commissioners ("SEARUC").<sup>2</sup> Regulatory authorities in North Carolina, Ohio, New Mexico, and Nebraska have also petitioned or supported the petitions as *amici curiae*.

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<sup>1</sup> The status of NARUC has been recognized by Congress in the Interstate Commerce Act and the Communications Act. 49 U.S.C. § 305(f); 47 U.S.C. § 410(e).

<sup>2</sup> SEARUC includes regulatory commissioners of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

The presence of state interests assures that *all* of the principal interests involved can be heard if plenary review is granted—the FCC, state regulatory interests, the carriers, and private manufacturing and supplier interests having different stakes in the ultimate outcome. In addition, this Court has in the past given due weight in considering certiorari requests to the fact that review has been sought by even a single state. See *New York v. United States*, 326 U.S. 572, 574 (1946); *Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961).

2. Respondents also do not dispute petitioners' contention that the FCC's jurisdictional claim involves a matter of continuing importance and that the FCC is seeking to apply it in regulatory matters even beyond the field of equipment. In addition to the direct preemption of state authority in *Telerent*, the FCC is relying upon *Telerent* for a major new program requiring registration of all new telephone terminal equipment in the country (Pet. 18-19) and to preempt regulation by two other states of intrastate telephone service. *Id.* at 19-20. Petitioners pointed out that *Telerent* almost certainly presaged FCC attempts to regulate intrastate rates themselves. Pet. 20.

The impact on state ratemaking authority is confirmed by NARUC (Pet. 11), SEARUC (Pet. 42), and the state *amici*. N. Mex. Br. 3; Ohio Br. 5. As SEARUC's brief clearly shows, "[t]he FCC's order . . . would foreclose the states from pursuing their ratemaking policies so far as terminal equipment is concerned, and would create pressures leading inexorably to higher residential telephone rates." Yet even the FCC conceded in *Telerent* that Sections 2(b)(1) and 221(b) were designed—at the very least—to pre-

serve "traditional State jurisdiction over intrastate rates and services . . . ." Pet. App. 29b.

Since the petitions were filed in September 1976, the FCC has confirmed this prediction and begun a new rulemaking proceeding which—considered in light of an earlier FCC report—directly threatens to invade state authority over intrastate rates.<sup>3</sup> This new venture confirms that the consequences of the FCC's new jurisdictional claim are virtually unlimited. It also makes nonsense of the FCC's attempt in *Telerent* to support its authority over terminal equipment by purporting to distinguish and respect Congress' concern to preserve "traditional State jurisdiction over intrastate rates and services."

In sum, the present "preemption" case, the FCC registration program, and the FCC's new rate-related inquiry confirm that the agency is now initiating a major restructuring of telephone terminal equipment regulation in this country. The very premise and foundation of this entire multifaceted program is the FCC's claimed statutory authority and preemptive power that is in issue in this case. It is therefore es-

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<sup>3</sup> By order released on November 8, 1976 (FCC 76-1008), the FCC initiated a new proceeding to consider further regulatory changes directly affecting terminal equipment and the rates associated with it. That order suggests that one objective of the proceeding will be "to insure that business vertical services, rather than basic local telephone services, are not among the beneficiaries of separations effects. . . ." *Id.* at para. 7, quoting an earlier FCC report released on September 27, 1976 (FCC 76-879). That report (para. 253) confirms that the new proceeding looks toward measures including the "unbundling" of local telephone equipment and service rates, establishing "network access" charges, and revision of intrastate "line charges" to assure that they are "compensatory." These are the very charges for and in connection with intrastate and exchange service which—like terminal equipment—are supposed to be beyond the FCC's jurisdiction under Sections 2(b)(1) and 221(b).

sential that the basic jurisdictional issue be definitively resolved as swiftly as possible and before this massive regulatory program irreparably alters the industry and the long continued distribution of authority over telecommunications.

3. Respondents are mistaken in contending that there is no conflict in decisions meriting certiorari. The petition showed that this Court has repeatedly held that state regulation should not be displaced in favor of federal regulation unless such an intention is "clearly indicated" by Congress.<sup>4</sup> The *Telerent* decision not only subverts state regulation of terminal equipment which has existed for over half a century (Pet. 21) but it does so in disregard of the plain language of the Act, violating yet another principle of statutory construction laid down by this Court.<sup>5</sup>

Equally striking is the conflict between the decision of the court below and the decision of the District of Columbia Circuit in *Kitchen v. FCC*, 464 F.2d 801 (1972). There, the Court of Appeals held that "[e]ven if" a switching facility handling interstate and intrastate calls was otherwise within the FCC's jurisdiction as part of an interstate line under Section 214 of the Act, Section 221(b) "exclude[d]" the facility from "the jurisdiction of the Commission" because it represented a "facility" for or in connection with exchange service. 464 F.2d at 803.<sup>6</sup> The language and

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<sup>4</sup> *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940), and cases cited at Pet. 21, n. 32.

<sup>5</sup> See *Caminetti v. United States*, 242 U.S. 470, 485 (1917), and cases cited at Pet. 25, n. 37.

<sup>6</sup> Even a brief glance at the decision refutes the suggestion of the FCC's opposition (p. 17) that this holding is merely "dictum." It is in fact the only stated basis for the court's decision, since the court never explicitly decided whether Section 214 would have applied to the facility in the absence of Section 221(b). 464 F.2d at 803.

logic of that case applies with even greater force to the present one.

Just like the switching facility involved in *Kitchen*, practically all telephone terminal equipment is used for and in connection with intrastate and exchange service. This basic use and capability persist even if the terminal equipment, like the *Kitchen* switching facility, can and sometimes does handle interstate calls. Thus, here (as in *Kitchen*) the reservation of state jurisdiction in Section 221(b)—“[n]othing in this Act . . .”—precludes FCC regulation “[e]ven if” (as in *Kitchen*) federal jurisdiction might otherwise reach the facility under other provisions of Title II. 464 F.2d at 803.

## II. The Oppositions Actually Underscore the Lower Court’s Departure from the Statutory Language and Legislative Intent.

1. The statutory language of the Act, the necessary starting point for inquiry (*Caminetti v. United States, supra*), states that “[n]othing in this Act” shall apply or “give the Commission jurisdiction” respecting “facilities” used for or in connection with “intrastate” or “exchange” service. The FCC’s opposition does not and cannot deny that telephone terminal equipment is generally used for intrastate and exchange service over 95 percent of the time, that it is ordinarily furnished under intrastate and exchange tariffs, and that it is an essential and recognized item of exchange plant. Pet. 6-7. Instead, the FCC opposition *rewrites* the statute by paraphrasing its language as if it purported to reserve state jurisdiction only over what the FCC calls “purely intrastate matters, 47 U.S.C. 152(b), 221(b).” FCC Br. 4. *See also id.* at 15.

However, the statute does *not* exclude FCC authority only over “purely intrastate matters,” either in those terms or by any other such qualification stated in Sections 2(b)(1) or 221(b). It says, in embracing language, that the FCC lacks authority over facilities used “for or in connection with” intrastate or exchange service.<sup>7</sup> Sections 2(b)(1) and 221(b)’s “facilities” language would in fact have been surplusage if it were limited to “purely intrastate” facilities, as the FCC intends that phrase, since (as the FCC itself asserts) practically all intrastate and exchange facilities may intermittently be used for interstate communication. The non-existent qualification which the FCC now imputes to Congress is further disproved by Section 221(b)’s explicit provision that the section applies to exchange matters even where the service involved “constitutes interstate . . . communication.”<sup>8</sup>

Once Sections 2(b)(1) and 221(b) are given their plain and conventional meaning, they obliterate the FCC’s basic claim that it has plenary power over terminal equipment under Sections 2(a) and 201-05. FCC Br. 13-14; API Br. 15. For, even if the FCC otherwise possessed statutory power to regulate telephone ter-

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<sup>7</sup> Congress was well aware that telephones and other facilities could also and were in fact used for interstate communication a fraction of the time. See *Doniphan Telephone Co. v. AT&T*, 34 F.C.C. 950, 967 (1962), *aff’d*, 34 F.C.C. 949 (1963).

<sup>8</sup> The FCC does not deny that exchange rates are outside its jurisdiction even where the exchange overlaps a state line and the calls are clearly interstate communications. *Southwestern Bell Telephone Co. v. United States*, 45 F. Supp. 403 (W.D. Mo. 1942). What it never explains is how the statute can be read to protect exchange “rates” but not exchange “facilities” when both words are used in the same context as part of the same statutory limitation on FCC authority.

minal equipment under such provisions of Title II, regulation would be foreclosed by Congress' express command that "[n]othing in this Act" shall extend to facilities covered by Sections 2(b)(1) and 221(b).<sup>9</sup> This is what the language says; and, as *Kitchen* confirms, this is what it means. See pp. 5-6, above.<sup>10</sup>

2. Contrary to the FCC's claim (pp. 18-19), the legislative history and purpose of the Act cannot be squared with the decision below. See also API Br. 12. The petition showed (pp. 29-30) that Congress sought deliberately to preserve existing state regulation, "to protect the State Commissions from being overridden by the [FCC]," and to assure the states "exclusive" jurisdiction within their respective spheres.<sup>11</sup> This existing state regulation prior to 1934 unquestionably embraced regulation of terminal equipment connected to local exchanges, a point which respondents do not

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<sup>9</sup> The proviso in Sections 2(b)(1) and 221(b) reserving the FCC's Section 301 radio license power confirms Congress' intention that Sections 2(b)(1) and 221(b) override other general FCC powers not explicitly exempted.

<sup>10</sup> The FCC opposition (p. 13) suggests that judicial review by this Court may be unwarranted because of alleged "legislative attention" to the issue. See also ARINC Br. 7. The only bills concerning terminal equipment died in the last Congress; and in any case the interpretation of the present statute is the responsibility of the courts. The FCC's argument is especially puzzling since, in opposing further consideration of the jurisdictional issue by the Fourth Circuit, the FCC has argued to the court below: "[I]f petitioners wish to challenge the wisdom of [the decision in this case], they should petition the Supreme Court for a writ of certiorari." Resp. Br. 45 n. 50, filed in *North Carolina Utils. Comm'n v. FCC*, 4th Cir., No. 76-1002 and consolidated cases.

<sup>11</sup> *Hearings on H.R. 8301, Before the House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess. 136 (1934); S.Rep. No. 781, 73rd Cong., 2d Sess. 3 (1934).

dispute and which is confirmed by countless state decisions both before and after passage of the Act. *E.g.*, Pet. 21-22, n. 33.

The FCC is not responsive when it argues in its opposition that the legislative history does not indicate Congress' desire to withhold from the FCC authority over "terminal equipment" which may be used in interstate as well as intrastate communication. FCC Br. 18. There is no reason why the legislative history should single out terminal equipment, because Congress was expressly reserving to the states jurisdiction over *all* "charges, classifications, practices, services, facilities, or regulations" for or in connection for intrastate or exchange service. Sections 2(b)(1), 221(b) (emphasis added). Congress' repeated expressions of intent to preserve existing state jurisdiction (which included regulation of terminal equipment), coupled with the express reference to "facilities" in Sections 2(b)(1) and 221(b), are more than ample proof of Congress' objective.<sup>12</sup>

Finally, no weight can be accorded to generalized claims that the jurisdictional power claimed by the FCC is needed to achieve the "purpose" of the Com-

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<sup>12</sup> The FCC relies pp. (18-19) on purported countervailing evidence that Congress intended to create an FCC capable of implementing national policy "unhampered by potentially conflicting local policies. See, *e.g.*, 78 Cong. Rec. 8822 (1934) (remarks of Senator Dill)." Examination of the cited page reveals no dissatisfaction with, let alone any intent to override, local policies or existing state regulation; and this very passage makes clear that Senator Dill's actual concern was not to supersede state regulation but to close a regulatory hiatus created by what he called the ICC's "curious attention" to growing interstate telephone service. *Id.* Indeed, in the same speech Senator Dill expressly noted the protection afforded by the Act to existing state regulation. *Id.* at 8823.

munications Act. *E.g.*, FCC Br. 14; API Br. 16. The preservation of state authority was no less a “purpose” of Congress than effective FCC regulation; Congress plainly concluded that both could be achieved by retaining state control over all “facilities” used for in connection with intrastate and exchange communications; and this judgment is amply confirmed by the extraordinary quality of telephone service achieved in the decades since the Act, during which time state regulation has continued without significant FCC interference.

3. Finally, despite the FCC’s claims to the contrary, past administrative practice clearly supports petitioners and not the decision below. The petition showed that for many years before and after the Act the states have continued to regulate terminal equipment matters in countless proceedings. Pet. 21-22. Throughout this period to the present, almost all terminal equipment has continued to be provided on rates, terms and conditions reflected in tariffs filed with state regulatory agencies. *Id.* at 6. The overwhelming use of such equipment is for intrastate communications. *Id.* at 6-7.<sup>13</sup>

Without directly challenging any of these facts, the FCC opposition (pp. 19-21) contends that the FCC has in the past asserted a right to regulate terminal equipment but has not previously been forced to override state authority in this sphere because the states have “acquiesced” in FCC regulatory policy. Even were

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<sup>13</sup> API Br. 12 asserts that the pre-1934 examples of state regulation are irrelevant. Since the legislative history of the Act shows an intent to *preserve* existing state regulation, the scope of state activity prior to the Act is manifestly pertinent. In any case, the same state regulation has continued for over 40 years since the passage of the Act. See Pet. 28-29.

this version of events correct—which it is not<sup>14</sup>—it would merely underscore the need for certiorari. For, whatever the FCC's past theoretical claims, the present decision is concededly the first major attempt to displace state regulation of terminal equipment, and the practical reality of this usurpation is what makes certiorari singularly important.

In view of the existing direct conflict between the states and the FCC, and the FCC's attempted preemption, the present case cannot on any view of the matter be "simply one more link" in an alleged "unbroken chain" of FCC decisions. See API Br. 9-10. Moreover, this "unbroken chain" is created by respondents' repeated citation and reshuffling of the same small group of FCC cases to present a virtual illusion of precedent. See FCC Br. 5 n. 4; API Br. 8, 10. When the actual facts and language of the citations are examined, the FCC's own cases turn out to provide little real support for its present jurisdictional claim, and none at all for preemption of state authority. See, *e.g.*, Pet. 31 n. 43.

As for the judicial decisions, the precedent most squarely in point—the *Kitchen* case—is directly contrary to the FCC's position. The principal jurisdictional citations relied on by the FCC are two *per curiam* decisions of the same circuit (FCC Br. 6 n. 5),

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<sup>14</sup> The FCC's version of history rests primarily on a misdescription of the *Carterfone* case. FCC Br. 7, 21. *Carterfone* did not in fact establish a general policy requiring connection of customer-provided terminal equipment in which the states then acquiesced. *Carterfone* involved connection of a radio system with a telephone system (13 F.C.C. 2d at 441) and the FCC itself stressed that the decision did not hold that a customer could substitute his own telephone equipment for that of the carriers. 14 F.C.C. 2d at 572.

neither of which contains any substantive reasoning or holding helpful to the FCC.<sup>15</sup> Manifestly, the decision below in this case, rendered by a two-to-one vote and deprived of *en banc* review by disqualification of judges, is one this Court should review.

### CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

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<sup>15</sup> *St. Joseph Tel. & Tel. Co. v. FCC*, 505 F.2d 476 (D.C. Cir. 1974) (brief unpublished memorandum); *Mebane Home Tel. Co. v. FCC*, D.C. Cir., No. 75-1617, April 30, 1976 (four sentence order).

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